TEXAS DEPARTMENT OF MOTOR VEHICLES

BOARD MEETING

9:00 a.m. Thursday, October 14, 2010

Room 120 John H. Reagan Building 105 West 15th Street Austin, Texas 78701

BOARD MEMBERS:

Victor Vandergriff, Chair Cheryl E. Johnson, Vice Chair Cliff Butler Jim Campbell Ramsay Gillman Victor Rodriguez Marvin Rush Laura Ryan Johnny Walker

STAFF MEMBERS:

Ed Serna, Executive Director Brett Bray, General Counsel

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PROCEEDINGS

MR. VANDERGRIFF: Good morning. My name is Victor Vandergriff, and I'm pleased to welcome you here today to the meeting of the Department of Motor Vehicles.

I'm now calling the meeting for October 14, 2010 of the Board of the Texas Department of Motor Vehicles to order, and I want to note for the record that public notice of this meeting, containing all items on the agenda, was filed with the Office of Secretary of State on October 4, 2010.

Before we begin today's meeting, please place all cell phones and other communication devices in the silent mode.

And if you wish to address the board during today's meeting, please complete a speaker's card at the registration table in the back of the room. To comment on an agenda item, please complete a yellow card and identify the agenda item. If it is not an agenda item, we will take your comments during the public comment portion of the meeting.

And now I'd like to have a roll call, please, of the board members.

Board Member Butler?

MR. BUTLER: Present.

MR. VANDERGRIFF: Board Member Campbell?

1	MR. CAMPBELL: Present.
2	MR. VANDERGRIFF: Board Member Gillman?
3	MR. GILLMAN: Present.
4	MR. VANDERGRIFF: Vice Chair Johnson?
5	MS. JOHNSON: Present.
6	MR. VANDERGRIFF: Board Member Rodriguez?
7	MR. RODRIGUEZ: Present.
8	MR. VANDERGRIFF: Board Member Rush?
9	MR. RUSH: Present.
10	MR. VANDERGRIFF: Board Member Ryan?
11	MS. RYAN: Present.
12	MR. VANDERGRIFF: And Board Member Walker?
13	(No response.)
14	MR. VANDERGRIFF: Board Member Walker is not
15	here. And let the record reflect that I, Victor
16	Vandergriff, am here as well. We have a quorum.
17	Our next item on the agenda is a public comment
18	portion of the agenda, and we do have one speaker wishing
19	to address us, and that's Jerry Dike.
20	MR. DIKE: Thank you, Mr. Chairman, members.
21	Actually, I wanted to speak yesterday. I stayed around
22	past executive session for a little while but you were
23	late coming out of executive session.
24	Mr. Bray recognized Gene Fondren yesterday who
25	has done so much for the dealer community and motor

vehicle business in the State of Texas and his recent passing.

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And there's one other significant motor vehicle icon who passed away in recent weeks, and that's Mr. Bob Townsend. He, of course, worked for TxDOT for 40 years and he was director of VTR for over 30 years, and he build the motor vehicle business in the State of Texas and put in the 17 TxDOT, at that time, VTR regional centers, worked with the tax collectors literally for decades, and he also, like Gene Fondren, was so well respected in national motor vehicle affairs.

He was responsible for the International Registration Plan, whereby all truckers have a single license plate and pay their prorated shares to states, and he let his staff implement IRP in 10 or 15 other jurisdictions, and now over the recent decades, of course, now all 50 states use IRP. So he also was an icon.

So those are two of the guys that set the stage for everything that you are doing.

So anyway, I just wanted to mention that, Mr. Chair. Thank you.

MR. VANDERGRIFF: Thank you. It's well noted. He was a giant in the automotive circles for sure. So thank you very much.

Before we go to the consent agenda, I want to

make one note based on discussions we had yesterday, and to tell the board and tell the public that in our next meeting, as we discussed, we're going to have an item on the agenda to review legislative matters and specifically notes and comments from the industry about two proposed bills that the agency has. And I'm going to request that Ms. Johnson certainly lead the effort on this, but that we will ask that the public and the affected industries or the associations that have interest in those matters, if there is any issue, controversy, dispute, clarification, question, whatever, that they come and talk to us about that. And at the same time I know she'll be reaching out to some other groups so that they have that opportunity.

So I think the board will benefit if we're going to vote on items and to see whether we remove or keep items or add to what we have, that in addition to staff presentations and board discussion, it would be appropriate to have industry comment available. So we'll make sure we have the proper notice out there to all those parties.

And with that, we're moving into our agenda itself. We have a consent agenda which I believe, unless we have comment, we can take all of these items up in one motion. We have Mr. Bill Harbeson here to discuss the consent agenda. I'm speaking specifically at this point

1	of number 2 on our consent agenda, going all the way to
2	number 3, which consists of pages 1 through 11.
3	Do any of the board members have any questions
4	or would like to pull one of these cases for individual
5	consideration?
6	(No response.)
7	MR. VANDERGRIFF: I see none. Then any
8	questions of Mr. Harbeson on any of these matters?
9	(No response.)
10	MR. VANDERGRIFF: I see no indication of that.
11	I would then be pleased to entertain a motion for approval
12	of the consent agenda.
13	MR. GILLMAN: So moved.
14	MS. JOHNSON: Second.
15	MR. VANDERGRIFF: I have a motion from Board
16	Member Gillman and a second from Vice Chair Johnson. Any
17	discussion?
18	MR. RODRIGUEZ: A question. Is that items 2.A
19	through D?
20	MR. VANDERGRIFF: A to D, all the way through.
21	MR. RODRIGUEZ: D.6, Mr. Chairman?
22	MR. VANDERGRIFF: Pardon me?
23	MR. RODRIGUEZ: Is that items 2?
24	MR. VANDERGRIFF: 2.A. through 2.D.
25	MR. RODRIGUEZ: Through D.6. Is that right?

1 MR. VANDERGRIFF: D.6, yes, sir. MR. RODRIGUEZ: Okay, thank you. So moved. 2 (Inaudible second.) 3 MR. VANDERGRIFF: We have a motion and a 4 second. Please raise your right hand in support of the 5 motion. 6 (A show of hands.) 7 MR. VANDERGRIFF: No indication anyone was 8 9 opposed so the motion passes, the consent agenda is 10 approved. 11 We are now at the item on our agenda number 3 which is resolutions for individual consideration, rules 12 and contested cases. The first is a proposed rule under 13 Title 43 of the Texas Administrative Code. Ms. Cost. 14 MS. COST: Good morning, board members, Mr. 15 Chairman. For the record, my name is Molly Cost and I'm 16 the director of the Motor Vehicle Division. 17 I'm here today requesting the board's 18 permission to publish amendments to Board Rule 215.109, 19 20 known as the Replacement Dealership Rule. This rule allows a manufacturer or distributor to replace a closed 2.1 22 dealership with a new dealership of the same line makes 23 without the new dealership being subject to protest by surrounding like line dealers. 24

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Basically, this rule lets the manufacturer or

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distributor put a placeholder in the market when a dealership is terminated for cause or when a voluntary termination occurs, allowing them to preserve the point and facilitate re-establishment of sales and service for the lines in question. In order to obtain this non-protestable condition, certain criteria must be present, and today's amendment proposal will expand one of those criteria and clarify another.

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Staff is offering this amendment to reconcile the rule with an amendment to Chapter 2301 of the Occupations Code that was approved during the last legislative session. House Bill 2640 increased the distance a franchised dealership may relocate without being subject to protest from surrounding like line dealers from one mile to two miles. Currently the rule at issue allows a replacement dealership to be located up to one mile away from the closed dealership and the proposed amendment would expand that distance to two miles.

Staff believes that harmonizing the exemption from protest provision of the statute with the exemption from protest portion of this rule will provide consistency and will be easier to implement for staff and for all affected licensees.

The other proposed amendment to this rule is to clarify that the dealers that must be notified by the

manufacturer or distributor of their intention to replace 1 2 the closed dealership are the dealers within the same county and within a 15-mile radius of the closed 3 4 dealership, the same dealers who would be eligible to 5 protest if this was a new dealership. This has always been the practice of the agency 6 7 with regard to this rule and the language will specifically spell out for the manufacturers and 8 9 distributors what their obligations are under this 10 provision. 11 Therefore, we ask for your approval to begin 12 the process of enacting this proposed amendment by publishing it in the Texas Register for public comment. 13 And I'm available for any questions. 14 MS. JOHNSON: Basically all you're wanting to 15 do is move it from one mile to two miles? 16 17 MS. COST: Yes, sir. MS. JOHNSON: I make a motion. 18 MR. BUTLER: Second. 19 20 MR. VANDERGRIFF: We have a motion from Board Member Gillman and a second from Board Member Butler. 2.1 22 discussion? MR. RODRIGUEZ: We're just posting the rule? 23

MR. RODRIGUEZ: We're just posting the rule?

MR. VANDERGRIFF: That's right, we're just

posting.

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All those in favor, please raise your right 1 hand. 2 (A show of hands.) 3 MR. VANDERGRIFF: The proposed rule will be 4 posted. Thank you. 5 6 MS. COST: Thank you. MR. BRAY: Mr. Chairman, would you please note 7 for the record that it was a unanimous vote? 8 9 MR. VANDERGRIFF: With Mr. Walker being absent, 10 so thank you very much. 11 The next item on our agenda is 3.B, and Ms. 12 Cost, you're still up. MS. COST: Again, for the record, my name is 13 Molly Cost and I'm the director of the Motor Vehicle 14 Division. 15 16 For those of you who were at the board meeting in August, I apologize because I'm going to pretty much 17 repeat verbatim what I said there. I figured it worked so 18 well last time, I'd just try it again. 19 20 The case you have before you, Protestants are four recreational vehicle dealers that carry several lines 2.1 22 of towable recreational vehicles, also known as travel 23 trailers, manufactured by Keystone RV Company. Keystone 24 is a manufacturer of many lines of travel trailers, 2.5 including the four at issue in this proceeding,

Challenger, Everest, Alpine and Avalanche. It is common in the RV industry for products to be refreshed and updated on a regular basis.

Protestants contend that their Challenger and Everest franchises were improperly terminated when Keystone simply performed the normal annual refreshing of the Challenger and Everest products but then changed their name to Alpine and Avalanche, designating them as new lines and forming a new dealer network for the products.

Keystone argues that the Alpine and Avalanche are not refreshed Challenger and Everest but new products, designed and engineered from the ground up with new and revolutionary features and different marketing and price points. Therefore, Keystone contends that it was able to establish a new dealer group to carry the new RVs without affecting existing Challenger and Everest franchises.

Two main issues are presented for the board's consideration.

MR. VANDERGRIFF: Let the record reflect that at 9:10 in the morning Board Member Walker joined the meeting.

MR. WALKER: Sorry for being late.

MR. VANDERGRIFF: That's all right.

MS. COST: Two main issues are presented for the board's consideration in this matter: are Alpine and

Avalanche new lines or just re-badged Challenger and Everest products for which Protestants have the right to be franchised; and absent a proper notice of termination by the manufacturer, does a request for repurchase of inventory by a dealer amount to voluntary termination of those lines.

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The SOAH proposal for decision states that while they share some of the same characteristics, Alpine and Avalanche are not re-labeled Challenger and Everest, and that Protestants failed to show that Keystone's goal through the introduction of the Alpine and Avalanche was to thin the dealer group.

In this regard, the ALJ recommends that

Keystone be ordered to provide all Texas Challenger and

Everest dealers with a copy of the board's final decision

in this matter, a copy of the franchise application for

Alpine and Avalanche, and a list of objective standards by

which Keystone will evaluate the applications.

In finding that Keystone improperly terminated Hoover's Challenger and Everest franchise, the PFD states that the board is not required to follow a prior agency decision, Buddy Gregg Motorhomes v. Liberty Coach, and therefore, Keystone should not have considered Hoover's request for inventory repurchase as a voluntary termination.

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For this violation, the ALJ recommends that Keystone pay a civil penalty of \$10,000, be reprimanded and be required to reinstate Hoover's Challenger and Everest franchise and the franchises of any other Texas Challenger and Everest dealers Keystone terminated for requesting inventory repurchase.

Staff is concerned that the ALJ's rulings on the first issue are conflicting. The ALJ finds that Keystone did not re-label the Challenger and Everest but then recommends that Keystone be ordered to allow each of the Challenger and Everest dealers to apply for Alpine and Avalanche, yet if Alpine and Avalanche are not re-badged Challenger and Everest but truly new lines, then the Challenger and Everest dealers have no right under Texas law to be offered the Alpine and Avalanche franchise as the ALJ has recommended.

Only if Alpine and Avalanche are the same as

Challenger and Everest with new lipstick, as argued by the

Protestants, should Keystone be required to allow all

Challenger and Everest to apply for Alpine and Avalanche.

With regard to the second issue, the Buddy

Gregg case basically states the determination has to occur

before a manufacturer is required to repurchase qualifying

inventory, and that absent a proper termination by the

manufacturer, a dealer's request for repurchase is

considered a voluntary termination.

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In this case the ALJ makes a distinction between Hoover's acceptance of repurchase on the Challenger and Everest inventory because changes to the products were on the horizon and the repurchase request by Buddy Gregg after an ongoing dispute with the manufacturer. The staff is concerned that the ALJ's recommendation creates an uncertainty that the Buddy Gregg case resolved: namely what effect does a dealer's request for repurchase have on a valid franchise.

Under state law the board may only change a finding of fact or conclusion of law for one of three reasons: misapplication or misinterpretation of applicable law, agency rules or prior agency decisions; reliance on a prior agency decision that is incorrect or should be changed; or a technical error. In reaching its decision, the board can rely only on the evidence that was submitted during the hearing and the sections of the law specified in the protest.

Staff recommends that several findings and conclusions be changed to correct technical errors and misapplications of law that do not alter the outcome of the case and has presented the board with an explanation of those changes, along with proposed orders for the board's consideration. They should be under Tab 3.B.1 in

1 your notebook. 2 I'm available for any questions. MR. VANDERGRIFF: Do any of the members have 3 4 any questions? 5 MR. RODRIGUEZ: Mr. Chairman. MR. VANDERGRIFF: Yes. 6 MR. RODRIGUEZ: Molly, just for clarification, 7 the proposed orders are Final Order Number 1 or Final 8 9 Order Number 2. Right? 10 MS. COST: Yes. 11 MR. RODRIGUEZ: And if we recommend either one 12 of those with the findings of fact listed thereby. MS. COST: Yes. 13 MR. RODRIGUEZ: Thank you. 14 MS. JOHNSON: I too have a question but it has 15 to do with rules. It's been suggested that we do not have 16 a rule -- and I did not have time to go through my rules 17 and look -- do we not have a rule that covers a dealer's 18 termination of a franchise? 19 20 MS. COST: We do not, no. There is nothing in the statute or our rules that discusses what a dealer must 2.1 22 do in order to terminate. 23 MS. JOHNSON: So that is likely something that had we had a rule, perhaps this could have been averted? 24 25 MS. COST: That relationship is usually

governed by the franchise agreement. Usually the 1 franchise will have some language in it with regard to 2 termination. If the manufacturer wants to terminate and 3 the contract is different than what's in the statute, the 4 statute controls; if the statute is silent, then the 5 contract controls. 6 7 MS. JOHNSON: So it wouldn't necessarily benefit us to even ask for a draft of rules on this 8 9 matter. 10 MS. COST: Oh, I certainly am not saying that. 11 I'm just simply saying it is not that there's nothing out 12 there. The contract between the parties, if it had language, would control in that situation. 13 MS. JOHNSON: Okay. 14 Thank you. MR. VANDERGRIFF: Any other questions? 15 MS. RYAN: I have one question just to clarify. 16 Do we have an option based on the conflicts to send it 17 back? 18 MS. COST: The board always has the option to 19 remand a case to get more evidence. 20 MS. JOHNSON: I'd like to move that this case 21 22 be sent back to SOAH for rehearing due to conflicts that have been identified. 23 MR. VANDERGRIFF: We have a motion before we 24

hear the case to send it back. Do we have a second for

25

that motion?

MR. CAMPBELL: Second.

MR. VANDERGRIFF: We have a motion by Vice Chair Johnson, a second by Board Member Campbell. Any discussion the motion? Vice Chair, do you have any discussion on it to elaborate?

MS. JOHNSON: I keep hearing we definitely need to give these gentlemen an opportunity to speak, I guess, but it seems that even Ms. Cost has said that there were some conflicting issues, conflicting matters and points that really need to be clarified, and so I would urge the board to send it back to SOAH.

MR. VANDERGRIFF: Any further?

MR. RODRIGUEZ: I don't think she said conflicting, I think she said error. Right? By making one finding that they were and then determining otherwise, that's a conflict that she's talking about but that's an error by law.

MS. COST: Yes, sir.

MR. VANDERGRIFF: Seeing no further indication of any discussion, I will call for a vote. We have a motion to remand back to SOAH. All those in favor, please raise your right hand.

(A show of hands.)

MR. VANDERGRIFF: We have two. All those

opposed, please raise your right hand. 1 (A show of hands.) 2 MR. VANDERGRIFF: The motion fails by a margin 3 of seven to two, so we'll hear the case. 4 5 Do we have any further questions of Ms. Cost? 6 (No response.) 7 MR. VANDERGRIFF: I will tell you that I'm not sure, is Mr. Hoover here in the audience. 8 9 SPEAKER FROM AUDIENCE: He is in route. He 10 called in saying he should be here shortly. 11 MR. VANDERGRIFF: Do you have any idea what 12 shortly means? SPEAKER FROM AUDIENCE: When I talked to him 22 13 minutes ago, he said 20 to 25 minutes. So if he's found a 14 15 place to park, he should be here just any moment. 16 MR. VANDERGRIFF: All right. Well, under the circumstances here, and I apologize, Board, I have a noted 17 that we have a note here that Mr. Hoover is not here at 18 the moment, but I think we will temporarily postpone the 19 20 start of this testimony from the parties until he can arrive, but we'll proceed to the next item on the agenda 2.1 22 until he arrives. 23 Our next item on the agenda is the Bailey's RV Sales case. Ms. Cost. 24 25 MS. COST: Thank you. Again for the record, my

name is Molly Cost and I'm the director of the Motor Vehicle Division.

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This matter was heard at SOAH basically as a default. The Respondent manufacturer did not show at the hearing.

The Protestant is a recreational vehicle dealer that carries several lines of recreational vehicles manufactured by Frontier RV, Inc. Frontier is a manufacturer of lines of recreational vehicles including the three at issue in this proceeding, Hyperlite, Explorer and Aspen.

Protestant contends that Respondent failed to repurchase three RV units after it voluntarily terminated its franchise agreements with Respondent. Although legally noticed for a pre-hearing conference and a hearing on the merits of these allegations, Respondent Frontier failed to respond to the complaint and attended neither hearing.

An administrative law judge from the State

Office of Administrative Hearings convened a hearing on
the merits of Protestant's complaint, received evidence
from Protestant, and found in favor of Protestant. The

SOAH ALJ recommends that Respondent Frontier repurchase
the three units at the amount of \$60,250 plus interest.

This proposal for decision is before the board

today so that you may consider whether to adopt it. No exceptions to the proposal for decision were filed by either party. In your packet you will find a proposed final order that incorporates the findings of the ALJ.

Again, the board may only change a finding of fact or conclusion of law for the three reasons that I have stated previously. Staff recommends that a few findings and conclusions be changed to correct technical errors and misapplications of law that do not alter the outcome of the case and has presented the board with an explanation of those changes, along with the proposed order for your consideration which all should be under Tab 3.B.2 in your notebook.

And I'm available for any questions.

MR. VANDERGRIFF: Are there any questions of Ms. Cost?

(No response.)

MR. VANDERGRIFF: Seeing none, I'm pleased to entertain a motion.

MR. RODRIGUEZ: Mr. Chairman, the proposed order will ultimately require your signature. I agree with the lawyer and I move that we recommend that we reject findings 1 and 5 and make conclusions of law on 1 and 5 as outlined in the submittal and also consistent with the proposed order that is in our packet.

1	MR. VANDERGRIFF: Motion for approval. Do we
2	have a second?
3	MR. RUSH: Second.
4	MR. VANDERGRIFF: Second by Board Member Rush.
5	Any discussion?
6	(No response.)
7	MR. VANDERGRIFF: Seeing none, please raise
8	your right hand in support of the motion.
9	(A show of hands.)
10	MR. VANDERGRIFF: The motion carries
11	unanimously, all board members present.
12	Our next item on the agenda is 3.C.1 which is
13	Hicks v. Kia Motors America.
14	MR. BRAY: Mr. Chairman, members. Brett Bray,
15	general counsel, Department of Motor Vehicles.
16	This agenda item involves three contested cases
17	involving warranty repair matters. The cases were heard
18	before the SOAH administrative law judges and those
19	proposals for decision are now before you to issue a final
20	order. I understand that the parties in Hicks v. Kia
21	MR. VANDERGRIFF: Mr. Bray, can I ask you to
22	speak up just a little bit.
23	MR. BRAY: Yes. I apologize.
24	I understand that the parties in Hicks v. Kia,
25	that's Docket Number 10-0133, are here to present oral

argument and we recommend you allow each party ten minutes to present their case.

I also understand that the Complainant in the Nolasco v. Wildfire docket numbers which are the other two cases has advised he cannot attend and asked to postpone consideration of these proposals for decision until November. We recommend that you grant this request.

ALJ's proposal for decision, you should know that you are restrained by 2001.058 of the Government Code, as Ms. Cost previously discussed with you and identified the three reasons that you have available to you for making changes to a proposal for decision. In addition, you must state in writing the specific reason and legal basis for any changes that you make.

With that, I'm happy to answer any questions you might have, or you can move to oral argument in the first case.

MR. VANDERGRIFF: All right.

MR. GILLMAN: Can I move to postpone these other ones to get that over with.

MR. VANDERGRIFF: You sure can. I was going to say that I was going to recommend that anyway. I understand there's a pregnancy in the family.

MR. BRAY: And actually, Mr. Gillman, I don't

1	think it's necessary. It's fine to make a motion, there's
2	nothing wrong with that, but the agenda is pretty much
3	subject to the chair's call
4	MR. GILLMAN: I'm just trying to make it easy.
5	MR. VANDERGRIFF: Well, since he's asked, well,
6	I'll go ahead and entertain the motion. So I've got a
7	motion from Member Gillman.
8	MS. JOHNSON: Second.
9	MR. VANDERGRIFF: And a second from Vice Chair
10	Johnson. All those in favor please raise your right hand.
11	(A show of hands.)
12	MR. VANDERGRIFF: It's passed.
13	MR. BRAY: And to clarify for the record, that
14	motion was to?
15	MR. VANDERGRIFF: To continue it to the next
16	meeting date in November.
17	MR. BRAY: Yes, sir.
18	MR. RODRIGUEZ: 3.C.2 and 3. Right?
19	MR. VANDERGRIFF: Yes, 2 and 3.
20	And I do not have any speaker cards on Hicks v.
21	Kia Motors. So you're saying the parties are here?
22	MR. BRAY: I was given to understand that but
23	let me check.
24	MR. VANDERGRIFF: Leo Hicks and Rusty Wiley.
25	MR. BRAY: Evidently Mr. Wiley is here and Mr.

1	Hicks is not.
2	MR. VANDERGRIFF: Okay. We're having a
3	problem. We flipped the matters around and the parties
4	are not showing up.
5	MR. BRAY: I don't believe Mr. Hicks intends to
6	show.
7	MR. VANDERGRIFF: He's not intending to be
8	here?
9	MR. RODRIGUEZ: Mr. Chairman, may I ask are we
LO	required to take testimony?
L1	MR. VANDERGRIFF: No, we're not required,
L2	however, we indicated to the parties that we will take
L3	their testimony, so in all fairness, I feel like they
L4	should be allowed to be heard.
L5	MR. BUTLER: If they're both here.
L6	MR. VANDERGRIFF: Correct.
L7	MR. BUTLER: We shouldn't hear one without the
L8	other.
L9	MR. VANDERGRIFF: Correct. I would agree.
20	Do we have any idea if the other party is
21	showing up?
22	MR. BRAY: Ms. Anderson indicated to me a
23	moment ago that she was under the impression both parties
24	were going to show.

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MR. VANDERGRIFF: Okay. Because I know they're

noted on the record as being here.

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Do we have any way of contacting? Okay, why don't we do that and bring this back to the board here in a moment.

Our next item on the agenda is 3.D.1 which is Pioneer Equipment, DBA Pioneer Equipment. Board, I apologize for the confusion.

MR. BRAY: These are enforcement motions for disposition based on default, and Mr. Harbeson probably in the future should be bringing those to you, but for the sake of simplicity, let me just try to do that this morning. These are cases where the dealer did not appear at the hearing which is similar to the situation we have today, but in a hearing situation, we call it a default.

Under your rules, if a dealer does not appear at the hearing, the allegations in the petition are considered to be admitted. The Enforcement Division dismisses the case from SOAH's docket and submits these motions for disposition based on default for final order, and the staff recommends that you approve these default orders.

MR. VANDERGRIFF: Mr. Bray, may be we consider them as a whole or do we need to consider them separately?

MR. BRAY: I believe you can consider them as a whole.

MR. RODRIGUEZ: So moved. 1 MR. WALKER: Second. 2 MR. VANDERGRIFF: Board Member Rodriguez has 3 moved for approval and Board Member Walker has seconded 4 that motion. Do we have any discussion? 5 6 (No response.) MR. VANDERGRIFF: Seeing none, I'll call for 7 your vote. Please raise your right hand in support of the 8 9 motion. 10 (A show of hands.) 11 MR. VANDERGRIFF: The motion carries 12 unanimously. I believe we've had one party show up in one of 13 our cases. Do we now have all the parties present, going 14 15 back up to item 3.B? We do, we have all the parties present. 16 I would note for Mr. Jones, Mr. Hoover, and we 17 have two representatives for Keystone, which is Chris 18 Pierson and Dave Thomas, that we are allowing 15 minutes 19 per side for presentation. 20 Mr. Jones, I believe you are up first. 2.1 22 MR. JONES: Good morning, Mr. Chairman, board 23 members. 24 MR. VANDERGRIFF: An I do want to note that 25 although they are aligned on the same side, they are

separate cases here, so Mr. Hoover will be afforded the same opportunity that Mr. Jones is.

MR. JONES: Thank you.

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The point that I wanted to call to the attention of the board this morning is that what this case involves is the termination or discontinuance of two franchises which were the Challenger and Everest lines.

Simultaneous with the discontinuance of those lines, the manufacturer, Keystone, came out immediately with two new products, Alpine and Avalanche, which were in the same price point. They were fifth wheels, recreational vehicles, same price point, marketed to the same demographics, represented by the same management staff and sales and marketing, manufactured in the same manufacturing plant by the same manufacturing employees.

Now, Keystone is a subsidiary of Thor

Industries which is the largest RV manufacturer in the

United States, publicly traded and many times larger than
the next largest RV manufacturer. So Keystone Division,
under the line that we were franchised for, it was
separate franchises for Challenger, Everest and Laredo, so
there were three lines under that division. After the
termination or discontinuance of Challenger and Everest,
the Alpine and Avalanche was placed in the same line, so
it's now Laredo, Alpine and Avalanche.

One thing that's really important to point out is that Everest and Challenger were two separate franchises, so you could have one but not the other, and in this hearing I had both Challenger and Everest, as did Mr. Hoover. Two of the other Protestants had just one, one of them had Everest only and one had Challenger only.

The reasons that we believe the changes were made was because under the new lineup, Alpine and Avalanche are one franchise and so in the sales statistics they'll be reported as just one franchise, they'll be combined which will have the effect of moving them higher in the rankings which is important in the recruitment of dealers.

And it might be noted that there was noting wrong with Challenger and Everest. They were number 5, combined they were number 5 in the state. When I became a dealer, they weren't even in the top 50, and dealers do all the marketing, manufacturers give no advertising support whatsoever to RV dealers. So in our case, the many years that we've had Challenger and Everest, we've sent hundreds of thousands of dollars promoting that product and that name and servicing those products and getting Keystone established in the marketplace.

Now, what happened was when they decided to come out with this new product, this Alpine and Avalanche,

this name change, they combined them as to one franchise, so if you were just an Everest dealer but you were entitled to that franchise, you got them both, if you were just a Challenger dealer, you'd get them both. And that's important because our standing is that's one of the issues here, as is Mr. Hoover's.

So anyway, what happened, there are two large RV dealership chains. The two largest RV dealership chains in the state of Texas are Camping World and Holiday World. They're multi-location, huge RV dealerships, chain dealers, and they are huge customers of Keystone, they represent a lot of Keystone and Thor products.

Well, when they came out with Alpine and Avalanche, every dealer that was a Challenger and Everest in the state of Texas, every dealer but one exception that had Challenger and Everest was given the Alpine and Avalanche franchise, just handed it to them, no preconditions met, no need to apply, they just handed it to them, except for the dealers that are in this protest and we are the dealers that operate in the trade area of Holiday World and Camping World who have been promised this product.

So the only criteria for getting the product was not to be in the trade area of Camping World or Holiday World, and unfortunately, Camping World is huge

and so is Holiday world and they're within a mile of my dealership, and they want the product, they've told us that they had lobbied for it. And we believe, and we believe the evidence clearly showed that the only reason that the name of Challenger and Everest was changed to Alpine and Avalanche was one, so they could be reported as one unit, and to realign the dealer body.

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And we showed in the evidence that the only changes made to the product were the same changes that were made to their sister products that did not have a name change. In other words, Montana is another fifth wheel that Keystone manufactures. All of the changes that were made from the Challenger and Everest line to the Alpine and Avalanche line, every change without a single exception, those same changes were made to Montana and Cougar and some of the other Keystone products. They were just normal advances and changes.

And so when we had the hearing, the issue of standing came up because at one point I had written a termination letter on Everest and then days later I rescinded that letter. I wrote it hastily out of anger.

And the way I understood that you terminate a franchise in Texas is you write a registered letter and you spell out and list all the inventory. So that's what we did. And on the fax cover sheet, my secretary typed out, instead of

just saying this is a buyback request for Everest, she typed out Everest/Challenger, but the letter attached to it was Everest only. And then the rescission came to Everest.

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The reason that's germane is that now Keystone, through its attorney, is saying that that fax cover sheet constituted an irrevocable termination of the franchise and there was no way to reinstate it. And that was never the intention, it was a clerical error. They did not buy any inventory back, nor did they ever offer to, nor did they ever even discuss the fact that Challenger was gone. But because Challenger and Everest were separate franchises, if I had Challenger and not Everest, I would still be entitled to Alpine and Avalanche if we prevailed on that hearing.

So I have written a letter to the board and have given it to Keystone requesting that some kind of rule be made. I know that Ms. Johnson raised that point. But it just seems to me that termination of a franchise, when it's undertaken by a dealer, ought not to take effect until an inventory is repurchased. A lot of these RV manufacturers are small and we have the situation ongoing continuously, like this with Frontier, where they wrote a buyback letter, Frontier didn't even show up at the hearing.

But the way the law works, you write the letter, you've terminated your franchise, the manufacturer refuses to repurchase the inventory, and then what do you do? You've got \$100,000 or more worth of stuff you can't sell legally. So I don't think that the legislature ever intended to be that harsh to the dealer.

And what I'm saying is that when we had this hearing, among the other errors that they found -- I mean, there were numerous errors -- the administrative law judge always referred to Cliff Jones Sealy Everest as the buyback letter. Well, Keystone at that hearing testified that they had bought back the inventory and resold it to other dealers, and the administrative law judge believed that and he had a finding of fact that Keystone acted on that letter, to their detriment, by repurchasing the inventory and reselling it, and he didn't believe us when we said no, they didn't re-buy it, I'm still selling it.

At the previous board meeting in August,

Keystone then came forward and said, Well, we didn't

repurchase it because we were stayed by filing of this

complaint. But that's not accurate because just weeks ago

they repurchased all the inventory of Lindsey Ward, First

RV, another one of the complainants in this deal.

So my point was I wrote the letter, I rescinded it. Historically and previously, the Motor Vehicle

Commission, and perhaps unofficially, has allowed rescission of a termination agreement if it was done before inventory was repurchased and before your license was changed taking if off the license.

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MR. VANDERGRIFF: May I stop you right there and ask if that's a true statement. And I'm sorry to stop you.

MR. JONES: No, that's perfect. I'd just say that there is some precedent. It's never gone to a hearing that I know of, but there is some precedent that you write a letter and then the manufacturer comes back in and says, All right, look, let's work this deal out, we'll give you some incentives, and it's rescinded.

MR. VANDERGRIFF: Ms. Cost?

MS. COST: What has happened in the past is, to be honest, sometimes the division is the last people to know when the terminations have occurred, and we'll be renewing a manufacturer's or distributor's license and they will tell us that these five dealers have been terminated, and we request them to provide us documentation of that, but we don't necessarily take the manufacturer's word for it, we also want something from the dealer. And quite often we find out that after the manufacturer received that termination letter from the dealer, they have gone back to the dealer and said wait a

minute, can we work this out, and so the parties have agreed to rescind it. It's not necessarily that we have allowed that to happen, it's just the parties have done it and we have recognized.

MR. VANDERGRIFF: Okay. But that's the department or the division had no official ruling or no commission.

MS. COST: No. If we were to get a letter from a dealer saying I voluntarily terminate my franchise, we would remove those lines from the license.

MR. VANDERGRIFF: Okay. All right. Pardon me for interrupting you.

MR. JONES: The point that I was trying to make, in addition to our case, I was asking the board to consider some kind of a rule so that it could be cleared up. I mean, clearly if the manufacturer wins on this where they say if you say you want to terminate, if you mistakenly write a letter, if you do anything and you're terminated, there's no undoing it, that's not what the legislature, in my opinion, intended. This law is supposed to try to protect dealerships.

And by saying that if there's a clerical error on a fax cover sheet that that constitutes an irrevocable termination of a franchise, I just can't imagine that that's what's happened. And yet, the ALJ in his findings

of fact, he always referred to Jones Everest until the final recommendation in law where he says Jones Sealy, and Keystone, of course, is saying Jones Sealy means

Challenger and Everest because of the mistaken fax cover sheet as well as the letter, and there was no rescission because it was too late.

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But as we pointed out, they never offered to buy the inventory, they never tendered payment. When I told them that I was rescinding the letter, they continued to allow me to sell the product, gave me a rebate. They said, All right, we'll help you sell it. So that, to me, was proof that they had accepted the rescission by their saying we will give you a rebate on every one you sell to help you close out the inventory. So to me, we're still licensed, we still sell the stuff. The administrative law judge was in error when he said Keystone had acted to their detriment by repurchasing and reselling the inventory.

There's so many other errors that came out, and I can be happy to go into any length, I've got lists of them here. But rather than take a lot of time to bore you, I think the key point that I wanted to finish by saying is that Mr. Hoover and I are both Everest and Challenger dealers, we were entitled to the Alpine and Avalanche. The only reason we weren't given it is because

we operated in a trade areas of Holiday World and Camping World. And that's not what it should be.

I mean, the RV stuff is so small. It's like

Keystone changing the name -- or like Chevrolet, when they

change or drop the line Monte Carlo or add Impala or drop

Caprice, they don't take franchises away from dealers, and

yet when they do, most of the time when a car manufacturer

drops a line like Mercury is now being dropped, they offer

compensation to the dealer for the loss of that franchise.

These guys, the RV manufacturers have not. Keystone has

not offered any.

MR. VANDERGRIFF: Can you wrap it up?

MR. JONES: Yes, I'll wrap it up and just say that what I'm asking is that you find that we are entitled to the Alpine and Avalanche franchise, and if not, because of the numerous errors and contradictions, that it be sent back for a new hearing. Thank you.

MR. RODRIGUEZ: I have one question.

MR. WALKER: Can I ask a question?

MR. VANDERGRIFF: Absolutely, Mr. Walker.

MR. WALKER: Mr. Jones, can you surmise to me why Keystone would not have given you the franchise instead of giving them to Holiday World and Camper World?

MR. JONES: Yes. Because Holiday World -- that was who was going to get it in our area -- Holiday World

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had made a commitment to spend hundreds of thousands of 1 dollars a year on television advertising which we don't 2 have the budget to do. We've been a good dealer, they're 3 4 happy with us, we've had good numbers, but we do not have the sales volume that Holiday World has. And so for them 5 6 it was an opportunity to get a bigger dealer and put them in multi locations. 7 MR. BRAY: In connection with our conversation 8 9 from yesterday, I need to remind the board, and I would 10 actually ask the chairman to remind Mr. Jones to stay 11 within the record, even in answering questions of the

MR. VANDERGRIFF: Thank you, Mr. Bray.

Please be reminded to stay within the record.

MR. JONES: I believe that was in the record, but the answer is that they offered to do a higher volume than we were able to do.

MR. WALKER: Thank you.

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MR. VANDERGRIFF: Chief Rodriguez.

MR. RODRIGUEZ: A question, Mr. Chairman.

Mr. Jones, did the manufacturer tell you, communicate to you in any way or manner that they were terminating their Challenger and Everest products?

MR. JONES: Yes.

MR. RODRIGUEZ: That's all. They gave you

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1	notice that they were going to terminate those products.
2	MR. JONES: Right. We got a telephone call.
3	Correct.
4	MR. RUSH: I want to make sure I understand.
5	The two, Holiday World and the other one, do they
6	presently have the franchise?
7	MR. VANDERGRIFF: For the board, remember
8	you've got a button underneath your desk.
9	MR. RUSH: My question is do Holiday World and
10	the other people that were supposed to get the other
11	franchises, do they presently have the franchises?
12	MR. JONES: No. The franchises there's a
13	stay on issuing franchises.
14	MR. RUSH: There's a hold right now waiting on
15	this.
16	MR. JONES: Until this is finished, yes, sir.
17	MR. RUSH: Thank you.
18	MR. VANDERGRIFF: Any additional questions from
19	the board?
20	(No response.)
21	MR. VANDERGRIFF: All right. Thank you very
22	much, Mr. Jones.
23	Mr. Hoover.
24	MR. HOOVER: Hello.
25	The main thing I want to go over is there seems

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to be, from what I can read -- and there's a lot of you read something on one page and it says something and you go to the next page and it contradicts the first page and back and forth -- I want to reiterate what happened because there seems to be something to do with the fact that they did buy back some of my product, that that somehow relinquished my franchise.

In order for that to happen, at least it's my understanding, that I have to request them to buy back my inventory and sign an agreement that says I hereby terminate my franchise. Now, I can either sign their agreement that they send me that says I voluntarily give up my franchise, or I can send them a letter that says that I give up my franchise. In neither case did that happen.

In a discussion with Keystone, we discussed the fact that the product, now that the whole world knew that it was no longer going to be built, and the fact that other dealers were going to be telling customers that that's an obsolete product, it's no longer going to be built, that automatically this was going to start devaluing this inventory.

Keystone volunteered to buy back the product or give me a discount in order to help me sell the remaining inventory, and I clearly stated to them that I was going

to contest any of this franchising changes or name changes or changing dealers. And I said, If you want to buy the product back, you're more than welcome to buy it back, but I'm not relinquishing any franchises, I'm not giving up any rights. And they said, We understand that, we'll do that anyway, we'll buy them back anyway.

No letter was ever sent to them saying I hereby terminate my franchise, and when they sent me a letter saying we're terminating your franchise, I called them and refused to sign it. The testimony in the ALJ court clearly stated they said, Did you send him this letter? He said, Yes. Did he sign it? No, he did not. So I mean, it was very clear that I did not terminate my franchise.

There's ten people on this board. If I have ten Challenger and Everest in stock and I sold each one of you one of those and completely depleted my inventory, that doesn't cancel my franchise. I pick the phone up and I order ten more. So I have a right to sell them to whoever wants to buy them, and if they volunteer to buy them, that doesn't change any rules, it just means they offered money and I agreed to sell them. It doesn't change my franchise agreement.

MR. VANDERGRIFF: Can I stop you and ask this question?

1 MR. HOOVER: Sure. MR. VANDERGRIFF: You accepted \$539,678 for the 2 repurchase of all of the inventory you had. 3 MR. HOOVER: With the understanding that that 4 did not affect my rights as a dealer, as a franchise-5 holder. 6 7 MR. VANDERGRIFF: And that's just a conversation that you had with them with that 8 9 understanding. 10 MR. HOOVER: Yes. And when they sent me a 11 letter trying to change that, I refused to sign that, and 12 they still bought them back. They agreed that that was 13 the agreement. 14 MR. WALKER: What has me concerned is you made 15 a statement just a second ago that says you said that I'm not terminating my franchise, and you specifically said 16 that they said, No problem, we understand. 17 remember making that statement just now? 18 19 MR. HOOVER: Probably, yes. MR. WALKER: Do you have anything in writing to 20 that effect? 2.1 22 MR. HOOVER: No. That was a conversation with 23 the president of Keystone at the time, the head man. 24 MR. WALKER: But they did not put that in

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writing to you.

MR. HOOVER: What they to put in writing was 1 2 something other than what we agreed and I did not sign that. 3 4 MR. WALKER: But has there been any testimony during the SOAH hearing to that effect? 5 MR. HOOVER: 6 Yes. MR. WALKER: That they said we understand that 7 you're not terminating your franchise. 8 9 MR. HOOVER: Yes. They asked if I had -- they 10 had a copy of a letter they had sent me and in the 11 testimony we asked them did I sign that, and there was 12 something that says I provided them with a letter, and if you'll look at that documentation, that's just a list. 13 manufacturer can call you every day and say send me a list 14 of what you have in inventory. That's not a request for 15 termination, that's a copy of what I have in inventory. 16 They just said what do you have in inventory. 17 MR. RODRIGUEZ: Mr. Chairman, I have a 18 19 question. 20 MR. VANDERGRIFF: Sure. MR. RODRIGUEZ: For Mr. Hoover. You said you 21 22 have a right to sell? MR. HOOVER: Sure. 23 24 MR. RODRIGUEZ: And when you say that, are you

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saying you have a right to sell Challenger and Everest?

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MR. HOOVER: Yes, I had a right to sell 1 2 Challenger and Everest. MR. RODRIGUEZ: That's what you're saying 3 today, you have a right to sell Challenger and Everest? 4 5 MR. HOOVER: Yes. MR. RODRIGUEZ: If they no longer exist. 6 MR. HOOVER: Well, if they no longer exist, 7 it's a moot point. The reason we're here is we wanted the 8 replacement product and they were denied to us. 9 10 MR. RODRIGUEZ: Just want to be clear that 11 you're claiming a right to sell Challenger and Everest. 12 MR. HOOVER: I'm also claiming the right to sell the other two products, the new products. 13 MR. RODRIGUEZ: That's not the question before 14 15 us, though. 16 MR. HOOVER: The only other comment I would like to make is that --17 MR. VANDERGRIFF: You still have time. 18 MR. HOOVER: -- people have suggested to me 19 20 that we should have had an attorney here, that we should have gone out and hired lawyers to present this case to 2.1 22 the ALJ judge and to you guys. We're not Thor, we're not 23 a billion-dollar company, we don't have the money to go 24 hire attorneys and pay the \$200 to \$400 an hour and get

\$50- to \$100,000 involved in this deal to determine what

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the rules and the laws are of Texas. I mean, these rules are rules that we're told that we're supposed to abide by and they're supposed to abide by, but yet now the burden is put on us to try to convince or prove that this rule does take effect, that this rule is part of this deal.

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We just can't afford in this economy to go out and hire attorneys, so I apologize for that if we have not done a good job of presenting this. I think the facts are there, I don't think there's any reason -- Cliff and I both have a lot better things to do than come up here and involve your time and our time doing this over and over again, and the ALJ judge.

It's plain and simple. I mean, I knew all along what the deal was. When I called and said, the rep called me and told me don't order any more Challenger and Everest, we're coming out with a new product, great, wonderful. But then when I kept asking when is it coming out, when is it coming out, he started skating the issue. And the reason he was skating the issue was he had been basically told that they wanted to switch to another dealer.

And basically, somebody asked Cliff why do you think they switched to another dealer. Market share. But the law clearly states that the determination for canceling a franchise cannot be because of market share

that you'd like to have. You know, you do the best job that you can. If you're trying to sell 10,000 vehicles a year and you only sell 5- and you did the best job you can, that's not a reason to lose your franchise.

The law clearly states if you're not convicted of a felony, if the state is not piled up with complaints about the way you do your business, et cetera, et cetera, then that franchise is yours, it's yours to keep, it's yours to nurture and move along and build your dealerships and build your advertising, as Cliff said. It's not up for someone just to all of a sudden -- the reason the laws were written was to keep -- very simple, let me pick two guys here, let me take Ramsay here and Victor. Okay?

If I'm the factory and I sell Ramsay 100 units and a month later and I say Ramsay, I want another order for 100 more units. And Ramsay says I still have 75 of the 100 you sold me, I can't buy them this month, maybe next month. And I say okay, well, we're going to go sell some to Victor then, and Victor is right down the street. The reason we have these laws is to protect the dealers from that type of operation. That's the reason the laws are in effect, and that's why the cancellation of a dealer or the changing of franchises should be clearly spelled out.

And I'm not sure, some people say the

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Occupations Code is a law, some people say it's a collection of rules. I don't know the difference. I mean, to me they're the same. But that's why we're here, guys. We're here, ladies and gentlemen, because they clearly pulled this franchise away from us without any regard to the damages that it would cause us as dealers. And I personally in my dealerships, and in Cliff's dealership, this was our main product line, this wasn't one of many, this was the main focus of our product line and that size of unit.

And I think it's very clear that every year every car manufacturer, every RV manufacturer, every boat manufacturer tries to improve their product every year. Every year when you're going to bring out the new 2011, you're going to try to come out with new features, new widgets, new things to make the customer say gee, I want to upgrade, I want to move to this new product.

And they did make changes to the new product, but like Cliff said, every good idea they came up with that, they spread out through their entire line, every new product got these new design features and these new widgets and this new deal. And when they added all those products in there, they didn't go change the name of every one of those.

MR. VANDERGRIFF: You still have a minute to

1	wrap up, if you would like to.
2	MR. HOOVER: I'm here to answer questions if
3	anybody has any.
4	MR. VANDERGRIFF: Any further questions from
5	the board. Mr. Walker?
6	MR. WALKER: No, but I'd like to make one
7	comment.
8	You commented that you didn't come here with a
9	powerful attorney and that you apologize for that. I
10	think I can speak pretty much for most of this board here,
11	we'd rather you be here and tell us your side of the story
12	instead of having an attorney represent you. So you've
13	done a good job of explaining it, to me anyway, where you
14	stand.
15	MR. HOOVER: Thank you.
16	MR. VANDERGRIFF: All right. Thank you very
17	much.
18	MR. HOOVER: Thank you.
19	MR. VANDERGRIFF: For Keystone, we have, I
20	believe, Chris Pierson and we also have David Thomas.
21	Mr. Pierson, I assume.
22	MR. THOMAS: No, it's David Thomas, Mr.
23	Chairman.
24	MR. VANDERGRIFF: All right.
25	MR. THOMAS: Thank you, ladies and gentlemen.

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I hope it doesn't bother you that I'm a lawyer, but I'm also a vice president at Keystone. So I asked Chris, he's our lawyer, I asked him if it was okay if I presented today, not directly in response to what you said, but I had planned on doing it anyhow.

Look, I don't know what all we can consider as part of this board or what all you can consider as part of this board, but I struggled in listening for these past two hearings on what's appropriate and what's not appropriate. We went through a tremendously long hearing, I think it was approximately nine hours. I sat through it, Mr. Jones and Mr. Hoover. It was a long, long day. A lot of evidence was heard that day.

And to get back to what you were saying, I think the main issue we have to refocus on is Alpine and Avalanche just a re-label of Challenger and Everest, and I think the best thing to do is to look at the record.

MR. VANDERGRIFF: Which, by the way, is the only thing we can rely on to look at.

MR. THOMAS: Right. But it seems like we've strayed a little bit from that, so I want to go ahead and go back to the record.

Here's what the ALJ found. In early 2009,
Keystone decided to change the Challenger and Everest line
make by a complete redesign. That was finding number 34.

Finding number 35: Keystone decided to start with a clean slate rather than a simple annual update of the Challenger and Everest products line. Finding number 36: the Alpine and Avalanche line makes has a series of major and minor improvements over the Challenger and Everest line makes. Finding number 40: Keystone did not re-label the Challenger and Everest line makes as Alpine and Avalanche line makes. That's number 40.

And then in the summary on page 24, I think this is important, he says, "But Protestants did not show that Keystone designed, produced and marketed the Alpine and Avalanche line makes solely as a means of eliminating a percentage of the former dealer group. The effect of the release of the Alpine and Avalanche may have been the same, but there was no showing that Keystone's goal was to thin the dealer group."

All of these findings are very important because if the findings were the opposite, if Mr. Jones and Mr. Hoover are correct that Alpine and Avalanche are just Challenger and Everest, they're right, they get them. But the findings were not that. Alpine and Avalanche, based on a nine-hour hearing, are not Challenger and Everest, and therefore, the only conclusion is they don't get the product line.

And going back to what Ms. Cost said -- you

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know, I'm not an expert on Texas law -- it looks as though the only way for this board to modify the decision is if the SOAH judge improperly applied the law, a prior decision relied on is incorrect which I don't think is applicable here, or a technical error in a finding of fact should be changed. I don't think any of those things occurred.

The only thing that potentially occurred is the ALJ's decision, once he made the decision to say that Alpine and Avalanche aren't Challenger and Everest, I don't think Keystone has an obligation to offer the Alpine and Avalanche to those Challenger and Everest dealers. That's pretty much what I wanted to get into.

The question of Mr. Hoover's termination and how we considered it, there was some exchanges. He did send us a fax, it did have a list of all of his inventory that he would like for us to repurchase, and Keystone bought it back for a little over \$539,000. He's right, he did not sign a voluntary termination, but where he misses it is we did send him a letter and he says he didn't sign the letter. I don't think the letter had any signature block for him to sign. It was a confirmation that his dealership was terminated. We never got a response from him: no, I don't want to terminate my dealership; no, do not repurchase my product. We bought back his product.

I think the Buddy Gregg decision confirms that once you buy that product back, that relationship is terminated, on top of the fact that Challenger and Everest were no longer produced. He gave an example that if he could reorder. If he ordered 100, he'd go back and order 100 more, or keep you away from ordering the 100 in his territory. He couldn't come back and order more Challenger and Everest, they weren't being produced. So that relationship was terminated.

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As far as Mr. Jones and his letter, he has now tried to get into the record that there was some secretarial error in the fax cover sheet that he sent to Keystone and the representatives. On the fax cover sheet he specifically mentioned twice that he wanted to terminate Everest and Challenger, that was twice. Now, his letter attached only addressed the Everest on his Sealy location. Now, that's confusing, that's hard to follow. The reality of it was it was interpreted that we're going to buy back both.

Now, I'm not going to go outside the record.

If you want to hear things outside the record, like some of this has occurred before, I can answer those questions. But the reality of it was the interpretation that you get at Keystone is he wanted us to buy back his Everest and Challengers both, and I don't think it's appropriate for

him to come up and say it was now a secretarial error. That wasn't part of the record.

Other than that, that's pretty much all I had.

I wanted to go back to the record, as I read it. I
listened to the entire hearing over again. The ALJ's
findings were that Alpine and Avalanche were not re-labels
and they are new products and they are open to the dealers
that Keystone would like to have represent those products.
The Camping World situation, not part of the record;
Holiday World situation, not part of the record. I don't
recall listening to it. Maybe my memory is just gone or
something, but I don't remember that being a part of the
issues. The issues were pretty narrow.

The only thing that we would ask, Keystone, I'm not certain why we're being penalized \$10,000 for buying back a dealer's product, regardless of if whether we interpreted it as a termination or not. I don't know why Keystone spent \$540,000 to get hit with a \$10,000 penalty. I'm not sure about that.

The other thing I'm not sure about, and I'd ask that the board consider, is eliminating the requirement that we have to offer Alpine and Avalanche an application to each one of those former Challenger and Everest dealers.

That's all I have. I'm prepared to answer any

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questions.

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2 MR. VANDERGRIFF: Members of the board? Mr. 3 Walker?

MR. WALKER: I have a question of Ms. Cost, if I could.

Molly, is there a definition of changing franchise -- well, let's see, how do I word this -- going from the Keystone to the Alpine -- not Keystone, but Challenger to Alpine --

MR. BRAY: Mr. Chairman, would you consider if we turn this microphone on?

MR. VANDERGRIFF: Please. That would be great.

In fact, in the future if we're in this room,

during the course of a hearing just sit there.

MR. WALKER: What constitutes changing or terminating one franchise and starting a new franchise with respect to re-manufacturing a similar product within the same factory? In other words, if you have a GMC dealership or franchise to sell GMC products and they change their Challenger car and started up a new car called the Everest car, does that change the franchise or does that change the model? Because to me, here we have that situation existing because the product is still made at the same place, they've just re-branded a product, so to speak.

MR. VANDERGRIFF: Can you explain, though, too, 1 does not the RV industry work a little differently? 2 MS. COST: Yes, the RV industry works a little 3 bit differently. They don't generally have Ford with a 4 bunch of models underneath it, they tend to franchise by 5 product. Meaning Winnebago has a bunch of lines, they 6 don't just have Winnebago, they have, gosh, probably 20-30 7 lines. 8 9 MR. WALKER: Each is a franchise? 10 MS. COST: Different franchise. It may be the 11 same document but there are check boxes for different 12 products, and they give certain products to certain dealers. 13 MR. THOMAS: If I may. We're brand-driven, 14 that's the difference. 15 MS. COST: But the MSOs, the certificates of 16 origin don't necessarily say Winnebago, they may say 17 whatever that specific product is. 18 19 MR. GILLMAN: So you can be a Winnebago dealer and not have six of their lines. 20 MS. COST: That's correct. 21 MR. VANDERGRIFF: It's fair to say that in the 22 23 RV industry franchises are really by line versus -- or by model. 24

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MS. COST: That's correct.

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MR. WALKER: And that's defined in the law? 1 MS. COST: That's not defined in the law. 2 There is no definition of line make in the code. There 3 are certainly some cases, there have been a few cases over 4 the years that have kind of these are some factors that 5 6 you look at to try to determine what's a line versus 7 what's a model. You're not going to like this answer, but these are very fact-intensive questions, and what were the 8 9 changes going from Product A to Product B. In one 10 instance they may be enough to make it a new line and in 11 another instance it may just be a re-badging of a model. MR. VANDERGRIFF: I'm sorry to interrupt, but 12 in this case the ALJ ruled on this question. 13 MS. COST: Yes, sir. They said this was not a 14 15 re-labeling, that these were new products. MR. VANDERGRIFF: These are new products. And 16 the board's decision is governed by -- restate again. 17 MS. COST: Right. I mean, basically the board 18 19 can't change findings except for three specific reasons, 20 and there appear to only be two involved in this case: technical error, misapplication or misinterpretation of 2.1 22 law. MR. RODRIGUEZ: Mr. Chairman, just to go back 23 24 on the ALJ's finding with regard to the fact that it was,

at least in his view, a new line. That was in finding

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number 34, 35, 36 and 40, and in the summary of the document as well. Right?

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MR. VANDERGRIFF: Mr. Walker, I apologize for the interruption.

MR. WALKER: I just wanted to clarify as to what makes a difference. But it doesn't sound to me like there is a defined rule, it's pretty much an arbitrary.

MR. VANDERGRIFF: Their franchise agreements indicate their line.

MS. COST: You certainly couldn't take a particular product that's being manufactured, have something that looks the exact same thing and sell it to another manufacturer or just change its name. Those, frankly, are simple. There is a provision in the code that prohibits a change in method of distribution that would be a termination, an illegal termination. That's not exactly what we have going on here, of course, and it is a fact question as to whether or not there were enough changes to make this a brand new product or just a relabeling, and the ALJ found that, that it was not a relabeling.

MR. WALKER: What did the SOAH judge find?

MS. COST: That's what the SOAH judge found.

MR. VANDERGRIFF: And the question I'd also have for you, if I could, Ms. Cost, is that a prior Motor

Vehicle Board, our predecessor here, found under the, I 1 2 guess, Buddy Gregg case that a dealer's request for repurchase terminated their franchise. Is that correct? 3 4 MS. COST: That's correct. In the Buddy Gregg situation there had been some ongoing dispute between the 5 dealer and the manufacturer. The manufacturer had 6 attempted to terminate them but had not done it accordance 7 to the letter of Texas law, and so those termination 8 9 attempts were considered invalid. Basically what happened 10 in that instance is the dealer just fine, forget it, then 11 I'm going to request that you repurchase these units. 12 The case was brought as they didn't repurchase 13 our product timely, and so there was a question about when the termination occurred, what action triggered it because 14 15 that starts that 60-day clock for repurchase. And the ALJ found, the board adopted, and the appellate courts 16 eventually confirmed that it was not the manufacturer's 17 attempts but the dealer saying I want you to repurchase my 18 19 product which ultimately terminated that franchise. 20 MR. WALKER: What about the other extenuating circumstances? 2.1 MS. COST: Certainly. 22 23 MR. VANDERGRIFF: Any further questions?

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says -- they call him and say we want to buy all your

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MR. GILLMAN: So if Hoover calls them and

inventory back and he says okay, that makes it a termination?

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MS. COST: The manufacturer has no legal obligation to repurchase product under Texas law.

MR. GILLMAN: They volunteer to buy it. In other words, if I've got 700 widgets in stock and need 500 and they need 200 and they come and say I want to buy them back, that's not termination. Maybe I'm not understanding.

MR. THOMAS: Can I chime in for just a second? The timing of this is kind of important, and maybe for purposes of your determination all this might be a side issue because Alpine and Avalanche, the finding was they were not Challenger and Everest. But on that issue, I think it's important, the product had been discontinued. The net effect of our buyback in that circumstance was he did not have Challenger and Everest on his lot. Hard to represent our product when they're not on your lot being able to be sold. That is the net effect of it. So the net effect was it was a termination of the relationship for that product

Now, again going back to Alpine and Avalanche versus Challenger and Everest, we still have to deal with that finding, so they're kind of separate issues. Even if you found that he was continuing as a Challenger and

Everest dealer, the question is is he entitled to Alpine 1 and Avalanche. 2 MR. WALKER: When did he not have the product 3 on the lot, after you repurchased it or before? 4 5 MR. THOMAS: We bought it back shortly after 6 the exchanges in October. 7 MR. WALKER: But the answer was the product was on the lot. 8 9 MR. THOMAS: Up until that time, yes, on all of 10 his lots. He had three lots that he had the product on --11 I believe it was three. 12 MR. WALKER: You're kind of confusing facts when you're saying he didn't carry the product on his lot. 13 MS. RYAN: Quick question. 14 15 MR. VANDERGRIFF: If I can get one person at a time, please. Are you in response to Mr. Walker? 16 MR. WALKER: I defer to Ms. Ryan. 17 MS. RYAN: The timing is important, I think. 18 What it states here is that in September Keystone 19 20 announced that it would not continue the lines, if I read this correct, and it was after that fact that the sales 21 representative -- if I have the correct title -- notified 22 Mr. Jones and Mr. Hoover that those lines would be 23 discontinued, and it was after that notification that Mr. 24

Hoover requested that his inventory be repurchased in

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October. And then my question then would be I'm assuming the check came and the pickup of the inventory was 60 days after that.

MR. THOMAS: It was in that, yes.

MS. RYAN: At the point that inventory was picked up and the check was cashed, Mr. Hoover knew that the lines that were being picked up would no longer be manufactured. Is that correct?

MR. THOMAS: That's correct.

MS. RYAN: Thank you.

MS. JOHNSON: I have a question.

MR. VANDERGRIFF: Ms. Johnson.

MS. JOHNSON: Ms. Ryan stated that it was announced, but I thought it was clearly stated in the last hearing that it was a phone call and it was not a company announcement, that it was a phone call from a representative of Keystone, and I need clarification on that.

MR. THOMAS: That's a good question. Each one of the sales representative for their territory contacted each one of their dealers and let them know that the Challenger and Everest product lines were being discontinued. I think you asked me that at the first hearing, and my answer was I wasn't sure whether we had sent out something or they had any evidence that they

contacted them. Since then I went back to the company and 1 I do have lists of each one of the dealers that were 2 contacted and the dates. So we did do that. 3 4 MS. JOHNSON: Keystone doesn't make it a practice to send out any documentation. And phone calls, 5 I'm sorry, a phone call is not -- there's nothing, in my 6 7 opinion, that's concrete about a phone call. Was there any written notice that this line was being canceled or 8 9 these lines? 10 MR. THOMAS: Not to my knowledge, no. I don't 11 know that there was any formal notice through our website 12 or whether there was a press release. I'd have to look for something like that. I don't know. 13 14 MS. JOHNSON: Thank you. 15 MR. VANDERGRIFF: In the industry, how prevalent is that type of notice on the cancellation of a 16 franchise, a verbal notice? 17 MR. THOMAS: We would prefer to contact each 18 one of our dealers personally. We thought in this 19 20 circumstance it would be a little cold to our dealers to 2.1 just send out a notice. 22 MR. VANDERGRIFF: And what the company has 23 historically done in other circumstances when they've 24 terminated?

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MR. THOMAS: It doesn't come up very often, but

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65 1 yes, traditionally, yes. MR. VANDERGRIFF: Do have other dealers that 2 objected? 3 No. The only dealer we bought 4 MR. THOMAS: back product from as a result was Mr. Hoover. 5 MR. BRAY: If I may, I'd like to suggest that 6 the board have a dialogue with Ms. Cost about the proposed 7 orders. You really have three before you: you have the 8 9 one the SOAH judge proposed, and I think you have two 10 options from Ms. Cost. And I think, if I can bring this 11 back and tie it into the presentations that we made --MR. VANDERGRIFF: I want to be clear of a 12 couple of things before you do that. First, if there's 13 any further questions -- I was going to say of Keystone, 14 because your attorney is here as well. You've got two 15 people here. 16 Yes. Mr. Pierson is here as well. 17 MR. THOMAS: MR. VANDERGRIFF: And you still have time if 18 19 there's any further comments that you'd like to make. 20 MR. THOMAS: No. Thank you. 2.1

MR. CAMPBELL: Mr. Chairman?

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MR. VANDERGRIFF: Sure, Mr. Campbell.

MR. CAMPBELL: In regards to Mr. Jones, my understanding is he sent a letter requesting to terminate his agreement. You have not purchased his inventory back

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at this time? 1 MR. THOMAS: No. 2 MR. CAMPBELL: But in either case, you do not 3 manufacture those, so in essence, he's still a dealer and 4 he still has product, but when that product goes away, 5 he's done. Is that correct? 6 MR. THOMAS: Correct. 7 MR. CAMPBELL: Okay. 8 9 MR. VANDERGRIFF: And why have you not 10 repurchased his inventory at this point? 11 MR. THOMAS: Well, as a result of the attempted 12 rescission and the followup protest action which came November 6 -- I think is the date of his letter to the 13 Motor Vehicle Board. 14 MR. VANDERGRIFF: All right. Thank you very 15 much. Unless there's other further questions. 16 MR. GILLMAN: Brett, where do we go in our 17 books to find these orders? 18 MR. VANDERGRIFF: Just one second, Mr. Gillman. 19 Mr. Hoover. 20 MR. HOOVER: Don't we get a minute to rebut? 21 22 MR. VANDERGRIFF: Yes, you do. So I would ask 23 before we go ahead and review the final orders, unless you

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believe it's appropriate to do that at this point. Then

I'd allow you a couple of minutes each.

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Mr. Jones, would you like to say anything further in a couple of minutes? Please come up to the

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table.

MR. JONES: Well, the only thing I wanted to point out, I guess, is that he's talking specifically about some of the findings that the ALJ made but he's only pointing out among the many findings the ones that are in their favor. The ALJ also found that they had done wrong and wanted to fine them \$10,000 and he also found that the dealers that were not given Alpine and Avalanche should be offered an application for franchise along with the objective criteria used to establish dealers, in which case we would all be awarded the franchise.

Because there was no criteria that was used to give the Alpine and Avalanche franchise to the Challenger and Everest dealers. They just called them up and said if you want Alpine and Avalanche, we will send you evidence of franchise to process your license, and that's the process they went through. There was no application or anything new, it was just exactly what happens every year when they add a new line and they send us evidence of franchise if they start making a new name.

And that's what I was pointing out. The fact is we don't know what the ALJ found. He was saying on the one hand it wasn't new product, but on the other hand that

we were entitled to it, and that Keystone had done wrong and they were being fined \$10,000.

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MR. VANDERGRIFF: Excuse me for interrupting, but he issued a clear finding. His reasoning going back and forth in the opinion may go back on both sides, but did he not issue a clear finding?

MR. JONES: In my mind I don't think he did.

MR. VANDERGRIFF: Can you answer the question yes or no? He issued a finding.

MR. JONES: I don't think he did. Just as he was saying Jones Everest and then he said Jones Sealy, I think that there's contradictions in there, in my opinion.

MR. VANDERGRIFF: Mr. Hoover.

MR. HOOVER: I wanted to make basically the same comment. If you read through the entire testimony, one of the questions that was asked was if we took all the fifth wheels that Keystone made, stripped all the names and the graphics off of them -- in other words, they were just white fifth wheels -- and piled them in a pile, could you tell one from the other. And everyone agreed no, you couldn't. Okay?

The slight differences from one unit to the other are not enough to change a line. The only reason you change the name is if you want to change the dealer body.

MR. VANDERGRIFF: I'm going to interrupt you 1 again and just ask this simple question. As I understand, 2 there's a back-and-forth discussion here, but did not the 3 ALJ issue a decision indicating that these were not re-4 5 badged lines? MR. HOOVER: On another page he contradicted 6 7 that statement. MR. VANDERGRIFF: Can you please answer that 8 9 question? The finding they issued, did they not --10 MR. HOOVER: I want to read one thing. 11 MR. VANDERGRIFF: Answer the question, please, 12 sir. The finding was issued that these were not re-badged lines. Is that not the finding? 13 MR. HOOVER: No, I don't know that. I did not 14 read it that way. I'm sorry, I did not. I did not read 15 it that way. 16 We're talking about what the ALJ said. This 17 piece of paper here is the agenda for this meeting. Let 18 19 me read it. Okay? 20 "The ALJ recommends a finding of violation, reprimand, and a \$10,000 civil penalty against Keystone RV 21 22 for improper termination; cease and desist against 23 Keystone RV; ordering Keystone to reinstate franchise agreements." 24

That's what he determined right there. As far

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as I understood, we won. Okay? We're still saying that I canceled my franchise agreement because I accepted the money, and that is just not the case. I did not terminate my franchise agreement.

We were talking the other day about General Motors when they built some propane powered cars and then they discontinued them, they bought them all back from their dealers. The only reason that I let them buy them back was I figured they had a diminished value because they were no longer going to be produced, and if I was going to get Alpine and Avalanche, I wanted to start fresh with the new product, not having the old product sitting on the lot in front of it. And when they offered to buy it back, I would have sold it to whoever offered to buy it back.

But it did not -- it was not -- when you send a letter to a manufacturer, you say under Section 230-whatever it is --

MR. VANDERGRIFF: You've got 30 seconds.

MR. HOOVER: -- of the Occupations Code I hereby terminate my franchise. That never happened, it was never done, and if you look at the letter, there is a place for me to sign on that letter, and I did not and I refused. I said this is not a cancellation of franchise, you can either buy it back or not, and they agreed to take

1 it anyway. 2 MR. RUSH: Can I ask one question? MR. VANDERGRIFF: Please. 3 4 Mr. Hoover, you have a question. 5 MR. HOOVER: Oh, I'm sorry. MR. RUSH: When they did purchase your 6 inventory back, at that point did you know that you were 7 not going to get Alpine and the other one? 8 9 MR. HOOVER: We were contesting on it. I was 10 asking for it. 11 MR. RUSH: Di k now whether you going to get it or not from them? 12 MR. HOOVER: They had told me I was not. 13 MR. RUSH: Thank you. 14 15 MR. VANDERGRIFF: Thank you, Mr. Hoover. Mr. Bray, Ms. Cost, with respect to the final 16 17 orders. MR. BRAY: I wanted to suggest to the board 18 19 questions you might have, dialogue you might want to 20 engage in with Ms. Cost to try to bring this back together for you because there are three proposed orders 21 22 before you: the one from the SOAH ALJ, and two from the staff. 23 24 Again, I'm going to try to tie this together 25 for you. The reason the staff thinks there is a

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misapplication of law is because the last paragraph in the part of the code that talks about termination talks about change in method of distribution. There are findings of fact that were recited, including numbers 33, 34, 35 and 36, that talk about clean slate, complete redesign, et cetera. There are findings of fact just past that, 37 for example, that Mr. Hoover and Mr. Jones referred to where it says they were essentially the same product.

This is one of the conflicts the staff is relying on, I think, as a misapplication of law, as well as the fact that on the one hand the SOAH ALJ says there was no violation and termination by re-badging the same thing, but on the other hand fining the Respondent for not giving the product.

And I think that's a dialogue that I would encourage the board to have with Ms. Cost to try to flesh out which one of her two orders -- or what her two orders actually are trying to accomplish for you.

MR. VANDERGRIFF: Ms. Cost.

MS. COST: The tension in the proposal for decision and what the board looks at in order to come up with an order are the findings of fact and the conclusions of law. Because of the constraints that are on the board in accordance with the law, these are the three things that you can change findings and conclusions, I'll be

honest with you, it's difficult to change a finding of fact. Those are usually credibility determinations that are made by the judge that heard the case. But if there's some sort of technical error, there's a date wrong or there's a misspelling or something like that, you can change it.

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The misapplication/misinterpretation of law generally comes with regard to the conclusions of law, and to me that's where the tension in this proposal for decision. The findings seem to say one thing and the conclusions seem to say another.

I agree with you, Mr. Chairman, there's pretty clear findings that the ALJ made that this is not a relabeling. If that's the case, I don't understand the conclusion of law that requires Keystone to provide the franchise agreement for Alpine and Avalanche -- I'm sorry -- it says to provide an application to get the franchise to all the current Challenger and Everest dealers. The recommendation from the ALJ is not to give Alpine and Avalanche to all the Challenger and Everest, just that Keystone offer that to the current Challenger and Everest dealers.

With regard to the finding of violation for termination, to me there seems to be a bit of a conflict with the Buddy Gregg decision. The Buddy Gregg decision

seemed to say that even if the dealer doesn't say the magic words "I want to terminate my franchise," if they ask for repurchase -- and I will grant you that we have a little bit of a different fact situation here -- but if repurchase occurs which the manufacturer has no obligation to do under Texas law unless there has been a termination, that that can be considered voluntary termination by the dealer.

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And it appears that Keystone relied upon that, there seemed to be some findings that support that, but then there's a civil penalty and a reprimand being recommended for them doing that. And those just seem to be a conflict to me.

Because of those conflicts, I have proposed several solutions, and let me make sure that you understand Order 1 and Order 2 aren't mutually exclusive. There's two issues here. You could rule one way on one issue and another way on another one, so basically these two orders could kind of merge. But the recommendation in the order, one side is we go with the findings of fact, we reject the conclusions of law, and the other set is we go with the conclusions of law and we reject the findings of fact, we change findings of fact. That's basically what these two orders come down to.

I don't know if that helped.

MR. WALKER: How does that affect the monetary 1 2 assessment? MS. COST: Again, my reading of this proposal 3 is that the monetary assessment is only that by 4 5 repurchasing the product Keystone considered that to be a voluntary termination, they are in violation of the law 6 because of that. They should not have treated the 7 repurchase of the product from Mr. Hoover as a voluntary 8 9 termination, and by doing so, they violated the 10 termination provision of the law and should be fined 11 \$10,000. That's the way I understand the ALJ's 12 recommendation. MR. WALKER: And we can't change that? 13 MS. COST: No. You can. You just have to do 14 it under one of those criteria, and I have provided that 15 for you in here. That's a misinterpretation of a prior 16 agency decision if you choose to look at the Buddy Gregg 17 case as precedent for this. 18 MR. VANDERGRIFF: Under Proposed Final Order 19 Number 2, you would be ruling with that in mind, that 20 Hoover voluntarily terminated the franchises. 2.1 22 MS. COST: That's correct. 23 MR. VANDERGRIFF: Any further questions? MS. JOHNSON: I have a comment. 24 25 MR. VANDERGRIFF: Sure.

MS. JOHNSON: This decision would have been a 1 2 great deal easier had we seen these four products, and obviously the SOAH judge did see them? 3 4 MS. COST: No. 5 MS. JOHNSON: But they made a decision that they were not re-badged. How could that decision have 6 been made without seeing it? 7 MS. COST: The Protestants did not bring units. 8 9 MS. JOHNSON: Or photographs? 10 MS. COST: Or photographs. They were not 11 introduced in evidence. There were witnesses there from 12 Keystone that were involved in this product, the Alpine and Avalanche and the Challenger and Everest, and they 13 testified with regard to the differences. I believe there 14 15 was a brochure from either Challenger or Everest introduced into evidence, but there were no photographs of 16 the Alpine and Avalanche. 17 MR. VANDERGRIFF: The parties would have been 18 19 given full opportunity to have presented evidence if they 20 wanted, so that evidence was asked to be presented and they didn't. 2.1 22 Any further questions of Ms. Cost? 23 MR. RODRIGUEZ: Whenever you're ready, I'd like to make a motion. 24

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MR. VANDERGRIFF: All right. If there are no

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further questions, I will submit this matter to the board.

And by the way, before I do that, before I

finish that, I will ask a question. Has it been ordinary

and customary for a board to, much like it would a motion,

to make a decision immediately? Does the board usually,

like a court would, take it under advisement and issue a

MS. COST: It's been my experience that the board has always made a decision at the board meeting.

decision later?

MR. BRAY: That's correct. You can take it under advisement. You do run the risk of criticism that there's something else going on and there's Open Meetings issues just being alluded to -- I'm not suggesting it at all. But yes, it has been customary that you take it up now.

And it's also, I'm sure as you're aware of, Robert's Rules and whatnot, typically you put a motion on the floor to discuss.

MR. VANDERGRIFF: Yes, I understand. But I'm asking a point of clarification.

MR. GILLMAN: Can I ask a question?

MR. VANDERGRIFF: Yes, absolutely.

MR. GILLMAN: So you've got Hoover and you've got Jones, and they're in this thing together, so whichever way we go, both go that way. Is that correct?

1	MR. BRAY: They are separate dockets, and if
2	for some reason the board chooses to go differently, to
3	take up one case at a time, you're entitled to do that.
4	MS. COST: I'm sorry. They are officially one
5	docket.
6	MR. BRAY: I'm sorry. Then my mistake.
7	MR. GILLMAN: One gentleman that appears to
8	have sent a letter of termination and one gentleman that
9	didn't.
10	MR. VANDERGRIFF: And that's the way the ALJ
11	looked at it, as well.
12	MS. COST: The improper termination question
13	with regard to the repurchase is only with regard to Mr.
14	Hoover. Whether or not Alpine and Avalanche are re-badged
15	Challenger and Everest, that would go to both Mr. Hoover
16	and Mr. Jones.
17	MR. VANDERGRIFF: Mr. Rush.
18	MR. RUSH: I want you to explain these two to
19	me more in depth.
20	MR. VANDERGRIFF: The two proposed final
21	orders?
22	MR. RUSH: The two orders.
23	MR. VANDERGRIFF: Okay.
24	MR. VANDERGRIFF: Do you have a specific
25	question of her, or do you just want her to go through

them.?

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MR. RUSH: No. I just want her to kind of to give me a little feedback on what's going on.

MS. COST: And Mr. Jones pointed out that there is another dealer. Camper Clinic is also a part of this protest but there was no issue with regard to termination, they didn't ask for voluntary repurchase or anything like that. So it would just be the question of do they get Alpine and Avalanche because they had either a Challenger or Everest franchise.

MR. WALKER: You lost me on that one.

MS. COST: I'm sorry.

MR. WALKER: There's a third party also?

MS. COST: There are actually four Protestants in this case. Mr. Jones and Mr. Hoover were the main Protestants; the other two joined after the initial notice of hearing went out.

MR. WALKER: Let's stop right there, because it's my understanding what we've been told and read is that the only two franchises that were not offered the following were Jones and Hoover. Is that correct?

MS. COST: That's not correct, no.

MR. WALKER: Oh, I thought he said that they were the only two that were not offered it.

MS. COST: No, sir. There were others. Pardon

me. Let me find the list. 1 2 MR. VANDERGRIFF: Looking at proposed Final Order Number 1. 3 MS. COST: Final Order Number 1, if the board 4 5 adopts that order, it reflects a determination by the board that Alpine and Avalanche are re-badged Challenger 6 and Everest and that Keystone improperly terminated 7 Hoover's Challenger and Everest franchise. So that would 8 9 basically go with the ALJ's conclusions of law, not 10 necessarily the findings of fact. 11 Do you want more in-depth than that, like 12 specific findings and conclusions? MR. RUSH: This pretty well goes with the ALJ's 13 ruling. 14 MS. COST: It goes with the ALJ's conclusion, 15 16 his last conclusion recommendation. It does require the rejection, the changing of some findings of fact. 17 would basically have to change the finding that these are 18 not re-labeled products, it would have to change that 19 20 finding. 21 MR. RUSH: That they are not re-labeled 22 products. MS. COST: Right. It would say that they are 23 the same. 24

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Okay.

MR. RUSH:

MR. WALKER: What conclusion does that leave us 1 2 with with respect to Mr. Jones and Mr. Hoover with their franchise, that they terminated their franchise even 3 4 though it's been a re-banded product? 5 MS. COST: Final Order Number 1 would say that Mr. Hoover, by accepting repurchase did not terminate the 6 franchise. Basically, Final Order Number 1 says that 7 Keystone did violate the law by terming the request for 8 9 repurchase as a voluntary termination, and it would assess 10 the \$10,000 civil penalty and the reprimand for that. 11 MR. WALKER: Without a recommendation to them

to reinstate or to offer the franchise of the Alpine and Avalanche?

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MS. COST: No. It would do both.

MR. WALKER: It would require Keystone to offer them the franchise?

MS. COST: It would basically find that these are just re-badged, they're just the same product with a new name, with new lipstick, and therefore, because they held Challenger and Everest franchises, they should have Alpine and Avalanche franchises.

MR. CAMPBELL: Molly, I don't see how we can change -- I mean, we don't have any additional facts to add to the first ruling, so we're just arbitrarily changing because they don't match. Basically, the ruling was that they did make a new product but they're fining them because we don't know why. And so you're saying we need to choose one of the two because we don't really have any additional information to change the facts, and we can't get new pictures or new information to make that determination. So if we just overrule that without any additional facts, I don't understand how we do that.

MS. COST: Well, I mean, we wanted to provide the board with flexibility because we do have these contradictions. I believe that the ALJ made the findings that the ALJ made, and just misinterpreted the law with regard to the conclusions. But of course, the board could see it a different way. So we were trying to provide maximum flexibility, defensible either way, but you're correct, the findings are what the findings are.

MR. BRAY: There is no proposed finding by Ms. Cost that couldn't be supported by the record or we wouldn't propose it. I understand your dilemma: a fact is a fact, you find it and you find it. But when you have a nine-hour hearing and a record the facts found, there can be several pieces of evidence that might tend one way or tend another, and somebody finds well, this is the fact from that, others might find this is the fact from that.

But she would never pose a finding of fact to you, and that's all these are right now are proposed

findings of fact and conclusions of law. We would never propose one to you that doesn't have any basis in the record.

MS. RYAN: Might I have one question?

MR. VANDERGRIFF: Yes.

MS. RYAN: In the finding of fact on the dealer.

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MS. RYAN: In the finding of fact on the dealer agreement, if I read it right, with Keystone says that they have the right to make changes or discontinue product lines without notice. The second question then is if we found that there's no longer a line to sell for Mr. Hoover to sell, whether he's terminated or not, am I accurate in saying that the law does not require Keystone to offer them a new line even though they have currently a line that's no longer in existence?

MS. COST: If Alpine and Avalanche didn't exist and all we were talking about is they discontinued Challenger and Everest and that's improper, we can't force the manufacturer to continue building a product. The only way they would get to continue with a Challenger and Everest like product is if the board determines that Alpine and Avalanche are just re-badged.

MS. RYAN: But Keystone is not required to offer every current dealer the new option to the new line.

MS. COST: Not if they are completely new products, that's true.

MS. RYAN: So one question that I have when you mentioned the orders could be combined, if the finding of fact states that they are not re-badged, they are new lines, and whether we decide that it wasn't voluntary termination but they had every right to discontinue and they had every right not to offer, can we remove the termination piece?

MS. COST: Yes.

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MS. RYAN: And then we don't have to decide one way or the other, and that seems to fit with what was in the finding of fact, if I'm reading it right.

MS. COST: I'm sorry, I'm not sure I have completely understood.

MS. RYAN: So if we separated them. If the finding of fact said they were not a re-badge, they were new lines, and we do know that Mr. Hoover has no inventory to sell, so whether it's a termination or not, he no longer has a viable business by his own choice, can we remove the termination fact, the termination decision, and then Keystone has decided not to offer them the new line so his business basically just goes away by choice of not having anything to sell.

MS. COST: So I make sure I'm understanding what you're saying, could the board just decide that these are not re-badged products and leave it at that and not

85 answer the question of whether or not the repurchase was a 1 2 voluntary or an involuntary termination? MS. RYAN: Because the decision of even if it's 3 a termination -- I'm asking for clarification -- doesn't 4 change anything because there's nothing to sell even if he 5 has a viable, even if it wasn't terminated. Correct? 6 7 MS. COST: That is true. In a, quote-unquote, normal termination proceeding where there's an ongoing 8 9 line and a dealer wants to continue selling it, there are 10 several remedies available from the board. If it's found 11 that the termination was improper, the board can simply 12 say no, you get to stay married and you have to continue with that franchise, and oh, by the way, because the 13 improper termination was so bad, we're also going to fine 14 you \$10,000. 15 Because there is no product and no franchise to 16 continue ongoing, you still have the option of fining them 17 if you find that it was an improper termination but you 18 19 don't necessarily have to rule on that question if you go with the fact that they are not re-labeled. 20 2.1 MS. RYAN: Thank you. MR. RODRIGUEZ: Mr. Chairman. 22 23 MR. VANDERGRIFF: Mr. Rodriguez.

MR. RODRIGUEZ: I understand Laura's question

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and if we followed something like that, then it would be a

revised version of Final Order Number 2 where we determine that they are new lines, not re-badged, and that termination is a result of the default process. Right? I mean, that's what you're saying, as opposed to making that finding.

MR. CAMPBELL: Well, if you make that finding, then it changes your rules too. Like if you make that finding, there may not be a \$10,000 fine. And then also the ruling that they have to offer the existing dealers, or previous dealers, I guess it would be, an opportunity for the new product, that's part of the ruling too, wasn't it?

MS. COST: Yes. Again, two separate issues, I believe: are they re-badged, and was the repurchase involuntary termination. So the offering of the agreement to current Challenger and Everest goes with the re-badging question, the civil penalty and reprimand goes with the termination part.

MR. RODRIGUEZ: So just for my clarity on that, if we determine these are new lines, then there isn't -- you were asking whether they were obliged to offer that new line to them.

MR. CAMPBELL: That was one of the rulings.

MR. RODRIGUEZ: Well, that's one of the rulings, and I agree that that's one of the

1 recommendations, but under the re-badging theory as opposed to new line theory. If it's a new line, they're 2 not obligated to extend that line. 3 MS. COST: That's correct. If the board finds 4 that this is a new line, then Keystone has no obligation 5 under the law to offer Alpine and Avalanche to the 6 7 Challenger and Everest dealers. MR. CAMPBELL: But that was the ruling that it 8 9 was a new line and then they still fined them and then 10 they still required them to offer that, and that's where 11 the conflict is. 12 MS. COST: That was the ALJ's recommendation, yes, that I believe is inconsistent in accordance with the 13 14 law. MR. BUTLER: Mr. Chairman. 15 MR. VANDERGRIFF: Go ahead, Mr. Butler. 16 MR. BUTLER: I would like to make a motion that 17 we go with proposed Final Order Number 1. 18 MS. JOHNSON: I'll second that motion. 19 MR. VANDERGRIFF: We have a motion and a second 20 on the floor. I can ask for discussion on those motions, 2.1 22 however, we have a motion and a second. Mr. Rush. 23 MR. RUSH: I think we just go ahead and vote and see what you're going to do. 24

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MR. CAMPBELL: Would you restate the motion?

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1	It's proposal 1. Is that correct?
2	MR. BUTLER: That's correct, Final Order Number
3	1.
4	MR. RUSH: That's to say it's re-badged.
5	Correct?
6	MR. VANDERGRIFF: So your proposed final order
7	that you're wanting to adopt is that Alpine and Avalanche
8	are re-badged Challenger and Everest and Keystone
9	improperly terminated Hoover's Challenger franchise.
LO	MR. BUTLER: Final Order Number 1.
L1	MR. VANDERGRIFF: We have a motion by Member
L2	Butler and a second by Member Johnson. Do we have any
L3	discussion?
L4	MR. WALKER: I do. What I would like to do is
L5	at the same time, Molly, can we not retake and either
L6	reduce the \$10,000 fine or abolish the \$10,000 fine, and
L7	does that have to be done through discussion or does that
L8	have to re-amend the proposal here?
L9	MR. VANDERGRIFF: Can I note a couple of things
20	first. Make sure and turn on these mikes. They must time
21	out after a period of time. Yours is on but it's been
22	noted to me that several members do not have mikes on when
23	they talk, including me.
24	MR. WALKER: To me, the \$10,000 fine is kind of

excessive because of all the confusion that's gone on with

both parties, the way I look at it. I don't think it's 1 2 fair to take and charge these guys \$10,000 when we're going to make them do something that they really didn't 3 want to do in the first place. But how do we do that? 4 5 MR. VANDERGRIFF: Make an amendment to the 6 motion. MR. WALKER: Okay. I would like to amend the 7 motion --8 9 MR. BUTLER: It's not your motion. 10 MR. CAMPBELL: Can we get further discussion 11 before the amendments? If we take Final Order Number 1, 12 basically it's saying, if that's on the table then, then that would be when you would fine them. Because they're 13 saying this was not a re-badge --14 15 MR. VANDERGRIFF: You would be fining them but you would have the ability as the board to reduce or 16 eliminate that fine, if you chose to do so. The facts 17 would logically conclude based on the fact that they 18 19 improperly terminated the franchise, and that was why the civil penalty was imposed, you could drop that civil 20 21 penalty. 22 MR. CAMPBELL: But in essence, though, by 23 choosing Final Order Number 1 is when they would need a 24 fine.

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MR. VANDERGRIFF: Unless you chose to waive

that fine. 1 MR. CAMPBELL: Right. But the way it was 2 initially presented to us, they shouldn't have ordered a 3 fine because there was no finding of a new -- I mean, 4 there was a finding of a new product. I think that now 5 this puts us in line with -- I don't even know how to 6 explain it -- but now it puts us in line to make that 7 determination. 8 9 MR. WALKER: And you're correct in what you're 10 saying. 11 MR. RUSH: Let me clarify. MR. BUTLER: It could also be --12 MR. VANDERGRIFF: Could we have one person talk 13 at a time, please, and I think Mr. Rush slightly had it 14 15 first, Mr. Butler. MR. RUSH: Let me clarify that number 2 means 16 it was not re-badged and number 1 means it was re-badged. 17 Correct? 18 MR. VANDERGRIFF: That's correct, 1 says it's 19 re-badged. 20 Mr. Butler. 2.1

MR. BUTLER: A modification of the fine could be a separate motion after this motion is voted upon.

MR. VANDERGRIFF: That's correct as well.

MR. BRAY: No.

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1 MR. VANDERGRIFF: Really? 2 MR. BRAY: I'm sorry, sir. There are two ways, if I may speak to Mr. Walker's question, there are two 3 4 ways for you to address the fine: one is to get a majority of the board members to vote this motion down, 5 and the easier way is to simply amend this motion 6 7 involving the civil penalty. So you can move to amend this motion and specifically address the civil penalty. 8 9 MR. VANDERGRIFF: Which is what he was about to 10 do. But Mr. Gillman had a question. 11 MR. GILLMAN: If you find they did -- if we're 12 saying they did just re-badge it to cancel those dealers, but SOAH said that they did not just re-badge it. 13 MR. BRAY: Those seem to be his findings. 14 15 MR. GILLMAN: It's a little confusing. MR. BRAY: Exactly. 16 MR. WALKER: And they fined them. 17 MR. BUTLER: And reprimanded them. 18 MR. VANDERGRIFF: But they fined them for the 19 fact that they improperly terminated the franchise. The 20 fine was for that, not for the re-badge question. 2.1 22 to make sure the board understands that. So that's a 23 different question.

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MS. JOHNSON: Say that again, please.

MR. VANDERGRIFF: They were not fined because

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of the re-badge question, they were fined because they 1 were viewed to have improperly, Keystone improperly 2 terminated the franchise. That was the reason for the 3 4 fine. 5 MR. RUSH: Of Mr. Hoover. 6 MR. VANDERGRIFF: Of Mr. Hoover, yes. MR. BUTLER: Mr. Chairman. 7 MR. VANDERGRIFF: Mr. Butler. 8 9 MR. BUTLER: I would like to amend the motion 10 to waive the fine and the reprimand as part of my motion. 11 MS. JOHNSON: And I'll accept that change to 12 the amendment and sustain my second. MR. VANDERGRIFF: We still are in discussion on 13 this motion. Mr. Campbell. 14 MR. BRAY: Can I just sort of encapsulate that? 15 As I understand it, the original movement and the original 16 second have reformed the second. 17 MR. VANDERGRIFF: It's basically Final Order 1 18 with removal of the fine. 19 MR. BRAY: That's fine, but that the original 20 movement and the original member that seconded it are 21 modifying the original motion. 22 23 MR. VANDERGRIFF: That's correct. MR. CAMPBELL: My misunderstanding or confusion 24 25 is that we're changing an order without any additional

facts. We're changing their ruling without any additional facts from an old product to a new -- from an old product so it hasn't changed, basically, and SOAH was saying that it was a new product. But then in the same sentence we've done just the opposite of what they did because now we're not fining them because they did it wrong.

And the way they ruled initially, SOAH should have — there shouldn't have been a fine and there shouldn't have been a — unless there was wrongful termination, there shouldn't have been a fine and there shouldn't have been a requirement for applications. But on this rule we're saying yes, they were in violation and they violated the termination agreement so there should be a fine, but we're saying we're not going to give them a fine. And then since they did this to not have to deal with the dealers by mis—stating or if there's not a new product, if there is a new product then the dealer has to fill out an application and apply for it, they're requiring them to do that or requiring them to offer that.

But with this motion right here, we're saying that we're knocking both of those out and so there's no fine at all, even though they tried to do this to the dealer. So it gets more confusing, I think we made it a little more confusing than it originally was. Does that make sense?

1 MR. VANDERGRIFF: I appreciate the remarks. 2 will call for a vote in just one second, but I will also tell you that I think we are headed down a slipper slope. 3 I'm afraid that we are considering things that are outside 4 5 of this record and concerned about the direction we're taking on this particular motion. 6 So I will accede to the board's request, 7 though, and call for a vote on this question which is to 8 9 approve Final Order Number 1 with the amendment to it that 10 Keystone not be fined the \$10,000 and reprimanded. 11 with that, a yes vote -- and I'll call for that in just a 12 second -- means you're approving that motion. So all those in favor of adopting Final Order 1 with the 13 amendment requested, please raise your right hand. 14 (A show of hands.) 15 MR. VANDERGRIFF: Motion has three votes for 16 All those opposed, please raise your right 17 it. hand. 18 (A show of hands.) 19 20 MR. VANDERGRIFF: Six opposed. Thank you. With that, seeing as how we have rejected Final 21 22 Order 1 as amended, I will ask if we have a new motion to 23 put on the floor. MR. RODRIGUEZ: Mr. Chairman. 24

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MR. VANDERGRIFF: Mr. Rodriguez.

1 MR. RODRIGUEZ: I move that we adopt Final 2 Order Number 2 in the following form, and so it will be modified in this manner, that Final Order Number 2 reflect 3 4 that Alpine and Avalanche are a new line, not re-badged, and that termination of franchises was the result of that 5 new line, in other words, a default result as opposed to 6 7 determining there was voluntary termination. MR. VANDERGRIFF: Do we have a second to that 8 9 motion? 10 MR. RUSH: Second. 11 MR. VANDERGRIFF: Second by Member Rush. 12 I will ask one question before putting it to discussion for the board of Ms. Cost. The \$10,000 fine, 13 does that become moot as a result of approval by the board 14 15 that Hoover voluntary terminated the franchise, or do we need to address that specifically? 16 MR. RODRIGUEZ: And it may require that we also 17 add to the changes in findings of fact in number 2, that 18 19 we modify that motion as well to include common changes. Is that what you want because you want the common changes 20 2.1 regardless. Right? The common changes to findings of 22 fact? 23 MS. COST: Yes, sir. 24 MR. RODRIGUEZ: So may I?

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MR. VANDERGRIFF: Absolutely.

MR. RODRIGUEZ: My motion as previously stated 1 with the findings of fact and conclusions of law as 2 outlined and to include also the common changes with 3 regard to findings of fact and conclusions of law under 4 5 Section C of our agenda item on this matter, unless you want me to list them all. The C part of this are just 6 common changes that need to take place regardless of 7 8 either one of the motions. So I'm not changing anything, 9 I'm just making sure the record is clear. 10 MS. COST: Are you proposing Final Order 2 as 11 written, or are you wanting to remove --MR. VANDERGRIFF: As written, but I think he's 12 13 making sure that the common changes that you proposed as written are also included. 14 MS. COST: So Final Order 2 as written. 15 MR. GILLMAN: Yes. 16 MR. VANDERGRIFF: Which includes the common 17 changes. 18 MS. COST: 19 Yes. 20 MR. VANDERGRIFF: But I have the question with 2.1 respect to the fine. 22 MR. BRAY: I think the question left on the 23 floor is about the fine, and I would pose the question 24 this way: if the board doesn't order a fine, there is no

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fine.

MS. COST: That's correct, and Final Order 2 1 actually says that this was a voluntary termination. 2 MR. VANDERGRIFF: My question was that renders 3 the fine issue moot at that point. 4 5 MS. COST: That's correct. MR. WALKER: And if it's a voluntary 6 7 termination, then that takes and requires Keystone then to go back and have to buy the inventory? 8 9 MR. VANDERGRIFF: They already have. 10 MR. GILLMAN: But they haven't bought Mr. 11 Jones's yet, have they? 12 MR. WALKER: I thought they had not bought his, he said. 13 MR. BRAY: The specific answer to your question 14 is manufacturers, under the guidelines of the statute, are 15 required to buy back a dealer's inventory if there is a 16 termination, voluntary or involuntary. 17 MS. COST: But the repurchase question is only 18 19 to Mr. Hoover. The issue was by accepting repurchase of 20 the units, did Mr. Hoover involuntarily terminate -- I'm sorry -- voluntarily terminate the franchise, and the ALJ 2.1 22 found that he did not, that Keystone should not have 23 treated that as a voluntary termination. And this final order would say that the ALJ misapplied the Buddy Gregg 24

case and that it should be treated as a voluntary

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termination, therefore, Keystone did not violate the law. 1 2 MR. BRAY: Mr. Walker, I understood your question to be by the order that's being proposed, do any 3 of the four dealers, if there's anything left, do they get 4 to have their inventory bought back. 5 MR. WALKER: And that was the answer to my 6 7 question. MR. VANDERGRIFF: The answer is yes. 8 9 MS. COST: Yes. 10 MR. VANDERGRIFF: Any further discussion? 11 (No response.) 12 MR. VANDERGRIFF: Okay. With that, I will --13 MR. CAMPBELL: Excuse me, Mr. Chairman. I'm 14 sorry. 15 MR. VANDERGRIFF: No, that's all right. MR. CAMPBELL: So basically, what this one is 16 there's no fine at this time because there's no violation 17 from Keystone. What about the part that was saying that 18 19 they should have the right to submit to an application for 20 this product? It's also not in this item. Is that correct? So this one stays with the original statement 21 22 that there's a new product and they are not in violation 23 of anything. Is that correct? 24 MS. COST: It stays with the ALJ's findings

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that these are not re-labeled products.

1	MR. CAMPBELL: Right. But it also, on the
2	other portion of it, it changes their ruling on no fine
3	and no requirement of application.
4	MS. COST: That's correct. It changes the
5	recommended conclusions of law because of misapplication
6	of the law. If they are not the same product, there's no
7	obligation under Texas law for the manufacturer to have to
8	offer it to the dealers.
9	MR. CAMPBELL: Okay.
10	MR. VANDERGRIFF: Further questions or
11	discussion?
12	(No response.)
13	MR. VANDERGRIFF: A yes vote will be to approve
14	Final Order Number 2. So with that, I will call for your
15	vote. All those in favor of approving Final Order Number
16	2 please raise your right hand.
17	(A show of hands.)
18	MR. VANDERGRIFF: Five. All those opposed.
19	(A show of hands.)
20	MR. VANDERGRIFF: Mr. Rush?
21	MR. GILLMAN: Mr. Gillman.
22	MR. VANDERGRIFF: Excuse me. Why did I say Mr.
23	Rush.
24	MR. GILLMAN: I did not vote.
25	MR. VANDERGRIFF: You did not vote. So you're
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abstaining from this vote. 1 MR. GILLMAN: That's correct. 2 MR. VANDERGRIFF: Do you have a reason for the 3 abstaining? Do you have a conflict? 4 MR. GILLMAN: I don't have a conflict as far as 5 6 trying to argue against the way the board voted, I think that Mr. Hoover has got a different situation than Mr. 7 Jones here and I hate to lump them all together, but 8 9 that's the way it is and there's nothing I can do about 10 it. 11 MR. VANDERGRIFF: All right. In the future I 12 would appreciate it if you make sure that you make those questions known before we have a vote so the rest of the 13 board might have the benefit of the question. 14 MR. GILLMAN: Well, I had asked whether it was 15 together or not. 16 MR. VANDERGRIFF: I did not know you would 17 abstain from voting. We should have understood that. 18 MR. GILLMAN: Should I have told you I was 19 going to abstain from voting before I even knew what the 20 deal was? 2.1 22 MR. VANDERGRIFF: No. At that point in time. 23 MR. GILLMAN: When it was proposed. MR. VANDERGRIFF: Yes. 24 25 MR. GILLMAN: Okay. Stand corrected.

MR. VANDERGRIFF: With that, the Final Order 1 Number 2 is approved by this board. 2 3 Mr. Bray. 4 MR. BRAY: If I may, just one point to clean up the record. Purely for the record purposes, the six yes 5 votes were the Chair --6 7 MR. VANDERGRIFF: There was five yes votes. MR. BRAY: I'm sorry. Five yes votes. 8 9 MR. VANDERGRIFF: Five yes votes, three that 10 voted no, and one abstention. 11 MR. BRAY: And those individuals for yes were 12 the Chair, Members Campbell, Rush, Ryan, Rodriguez. were Members Walker, Butler and Johnson. And Mr. Gillman 13 was in abstention. 14 MR. VANDERGRIFF: That's correct. 15 MR. RODRIGUEZ: May I excuse myself, Mr. Chair? 16 MR. WALKER: You're leaving the meeting? 17 MR. GILLMAN: Yes, sir. 18 19 MR. VANDERGRIFF: Okay. Let the record reflect that Board Member Rodriguez has left the meeting. Thank 20 21 you for your service today. We are now moving on and it looks like we have 22 23 the parties here. Would the board, given that we've been at this for two hours, like to have a ten-minute break? 24

Okay, we're adjourned at seven after 11:00 for ten

minutes.

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(Whereupon, a brief recess was taken.)

MR. VANDERGRIFF: It is 11:25 in the morning, and I would be saying that I would be calling the meeting back into order after adjourning, however, because I used the wrong terminology having basically adjourned the meeting, I need to make sure and note again for the record that I am calling a meeting for October 14, 2010 of the Board of the Texas Department of Motor Vehicles to order, and note for the record that we did have public notice of this, it was submitted to the Office of Secretary of State on October 4.

And I need to have a new roll call just to make sure we have everybody here for the meeting, so I'd like to have the roll call, please, in alphabetical order of the board members.

Board Member Butler?

MR. BUTLER: Here.

MR. VANDERGRIFF: Board Member Campbell?

MR. CAMPBELL: Present.

MR. VANDERGRIFF: Board Member Gillman?

MR. GILLMAN: Here.

MR. VANDERGRIFF: Vice Chair Johnson?

MS. JOHNSON: Present.

MR. VANDERGRIFF: Board Member Rodriguez is

1 absent. Board Member Rush? 2 MR. RUSH: Here. 3 4 MR. VANDERGRIFF: Board Member Ryan? 5 MS. RYAN: Here. MR. VANDERGRIFF: Board Member Walker? 6 MR. WALKER: Present. 7 MR. VANDERGRIFF: And let the record reflect 8 9 that I, Victor Vandergriff, am here too, so we do have a 10 quorum and we're now going back to our agenda and we're on 11 item 3.C, which is Hicks v. Kia Motors America. And Mr. 12 Bray. MR. BRAY: I know that Mr. Hicks is here, and 13 if I could indulge the chair to put out a call for Kia, 14 perhaps we could have the parties come forward and then 15 Mr. Hicks could make his presentation to you. 16 MR. VANDERGRIFF: I think we were going to 17 check and try to find Kia before. Have we ever found 18 them? Have they ever been here? They have been here so 19 20 they are here somewhere. MR. BRAY: Yes, sir. I am told the Kia 2.1 22 representative was here. 23 MR. VANDERGRIFF: We're going to be dangerously

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close to the end of our agenda, so do we have the parties

here now or are we still missing?

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MR. BRAY: Mr. Chairman, evidently present 1 2 today are the Consumer Complainant and a representative of the dealership that made the repairs. Evidently the 3 Respondent from Kia Motors elected not to attend. 4 5 MR. WALKER: They're here but don't want to attend? 6 7 MR. BRAY: No, sir. They're not here. MR. VANDERGRIFF: Mr. Hicks. 8 9 MR. HICKS: For the record, my name is Leo 10 Barron Hicks. I reside at 3301 Bluebell Place, 11 Richardson, Texas, and I am the Complainant in this 12 matter. MR. VANDERGRIFF: And Mr. Hicks, I apologize, I 13 14 didn't note that you have ten minutes for your 15 presentation. MR. HICKS: Okay. Thank you, sir. 16 In the fall of 2006, I believe, I bought a 17 brand new 2007 Kia Optima from Central Kia in Plano, 18 In approximately August 2008, while driving on the 19 Texas. highway, the car experienced a catastrophic breakdown. 20 literally broke down on the highway, stranding me on the 2.1 22 highway. I had the car towed to Central Kia who covered 23 24 the loss under the warranty. And this is important, the

warranty only applies if there is a determination that the

vehicle was defective in material or workmanship. So they covered this particular loss and I was on my way.

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Less than a year later, June 27, 2009, the car experienced a second catastrophic failure under the same facts and conditions: I was driving down the highway in triple-digit weather without warning the car simply stops. I again had the car towed to Central Kia, but this time they denied the claim because they concluded that the cause of the second catastrophic engine failure was someone left the radiator cap off the radiator.

Now, I immediately objected to this finding. I filed a complaint with Central Kia of America, and eventually I filed a claim upon my insurance carrier. At first my insurance carrier denied the claim. I filed a second claim and eventually they covered the loss.

Central Kia repaired my vehicle on or about November 1, 2009, and the cost of that repair was \$3,347.55. This is what Central Kia had on their own invoice, and I believe that invoice number was -- if you will bear with me, I can find that invoice number -- the invoice number was 100674.

Unfortunately, Central Kia still hadn't repaired the car because when I drove it off the lot there was a loud engine noise and the vehicle literally shook as I drove it off the lot. So about two or three days later

on November 5, I brought the car back to Central Kia.

Central Kia repaired the car a third time and they didn't charge me anything for the third repair, again because they concluded that the repair was under warranty as there was a defect in material or workmanship.

I get the car about one and a half months after I had turned it back the third time, and I get the car, I think, on something like on December 22, 2009. But Central Kia refuses to give me the car unless I pay them an additional \$500, and the reason they said that I owed them additional \$500 is because they said, Well, this is your insurance deductible. Again, it's important to note that I paid the car in full pursuant to Central Kia's own invoice.

Central Kia had given me a loaner car in between the second time it broke down and the third time they fixed it, and even the loaner car was defective, it didn't have a horn. I paid Central Kia the money for the car because Central Kia threatened to have me arrested if I didn't return the loaner car, and I couldn't get my car back until I paid the additional \$500, so I paid the \$500. And I immediately filed a complaint with the Department of Motor Vehicles.

A hearing was set. I filed a motion for partial summary judgment, I filed all of my documents with

the department, with the ALJ and with Central Kia, and a hearing was set on June 24, 2010. Evidence was taken at that hearing and the vehicle was inspected, including with the radiator cap off. When we went outside to check the vehicle while the vehicle was cold — because the hearing lasted for about three or four hours — I turned on my vehicle, I let it idle, we took off the radiator cap, and within one or two minutes fluid began to bubble out of the radiator.

Unfortunately, the administrative law judge ruled in favor of Kia which brings us to this meeting today. I am asking this board to reverse the decision of the administrative law judge and rule in my favor for the following reasons.

First, there was a willful violation of the scheduling order of 3/17/10 and the Texas Administrative Code, Section 155.103(a). The scheduling order required, and I quote, all documents must be filed with the State Office of Administrative Hearings and sent to the ALJ, and the order further required that all documents must be served upon the other party. The Texas Administrative Code echos that administrative order by demanding that on the same date a document is filed, it shall be served on each party.

I complied with the administrative order. The

Respondent, however, did not. They did not file any of the documents presented at the hearing upon the department, they didn't file any of their documents with the ALJ, and they most certainly did not give me copies of those documents.

At the beginning of the hearing I moved that all of Respondent's documents be excluded from the hearing, and the administrative law judge ignored the order, ignored the code, and admitted the Respondent's documents by arguing that he interpreted the words "must" and "shall" as being discretionary, and so he had the discretion to ignore the order and the Administrative Code and allow Respondent's documents into evidence.

The scheduling order and Administrative Code, however, are clear on their face. They establish mandatory, not permissive, filing and service requirements, and the Respondent committed a fundamental breach of the filing and service requirements by failing to comply. And the administrative law judge committed an even greater abuse of his authority and his discretion by ignoring the binding authority of the order and the Administrative Code and favoring one party over another party. He literally rewarded the Respondent for his noncompliance.

The second ground is another abuse of

defense as to the June 27, 2009 breakdown is that the breakdown is not covered by the warranty because someone left the radiator cap off, yet the ALJ refused all cross-examination of the Respondent's as to the identity of the person who left the radiator cap off, when the radiator cap was left off, where the offense occurred, how the cap was misplaced, what services were performed on the vehicle when the radiator cap was allegedly left off, and how the vehicle passed a state-required safety inspection in the middle of May of 2009, less than I believe it was like six weeks before the car broke down, and the safety inspection didn't discover this loose radiator cap.

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Or how for six months between the time that someone last touched that radiator cap -- because I had my oil changed, I think it was, on January 11, 2009, the breakdown occurred June 27, 2009, how it's possible for a radiator cap to be off a radiator for six months and show no sign of a problem whatsoever. No smoke emanated from the car in that six-month period, no fluids were evidenced in that six-month period, there were no flashing lights in the car prior to the car experiencing the breakdown, and there was no performance problems with that vehicle between the last time someone touched the radiator cap and when the car broke down.

A third ground is that the ruling of the administrative law judge misstated the facts, ignored relevant, material and dispositive evidence. The dispositive evidence is as follows. On two separate and distinct occasions the Respondent -- am I going too long?

MR. VANDERGRIFF: You have one minute to wrap.

MR. HICKS: Okay. On two separate and distinct occasions the Respondents have admitted that the vehicle was defective in material and workmanship. When they repaired the vehicle in 2008 with the first breakdown, the only way they could do it under warranty is if the vehicle was defective in material and workmanship, and they also admitted it when they repaired the vehicle a third time in 2009.

I know that I'm running out of time, but this is crucial. The inspection of the vehicle at the end of the hearing is dispositive as to all issues regarding the radiator cap. Again, fluid began to emanate from that radiator cap with a cold vehicle within one or two minutes of its idling. That demonstration conclusively shows that the car could not have gone two minutes, two miles, two weeks, two months without a breakdown.

It's important for you to understand that I drive that car 50 miles to and from work every day, and I traveled to Abilene, Texas once and Houston twice without

any problems with that car. There is no way that a left 1 2 off radiator cap could have been the cause of that vehicle breakdown. 3 I think I've exceeded my time. I have more to 4 say but I guess I'll say it on rebuttal. 5 MR. VANDERGRIFF: All right. Thank you. 6 7 And I believe we do have a representative from Central Kia here as well. Did you care to make any 8 9 presentation? You have ten minutes in which to do it, or 10 you don't have to. MR. BRAY: For clarification --11 12 MR. VANDERGRIFF: This is not Kia Motor 13 Company. MR. BRAY: That's right. And the proposed 14 15 order is not against Central Kia. MR. VANDERGRIFF: That's right. 16 17 MR. WILEY: Thank you, board members. is Rusty Wiley. I'm at 3401 North Central Expressway, 18 Plano, Texas. 19 20 Going back over what Mr. Hicks said, I realize that none of you were at the last hearing to see any of 2.1 22 the evidence that was presented for the ALJ to make his 23 decision. If you can visualize, I know most of you have

tried to get into an aspirin bottle at some point in time,

it has some tabs on there that you have to get that

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aspirin top past those tabs in order to remove that top.

A radiator cap is identical to that. A radiator cap will loosen a quarter of a turn, the tabs will connect, when they do you have to press down on that radiator cap, push it past those tabs to loosen it off.

When the vehicle came to us on the day that he stated, we found, and were present with Mr. Hicks when we looked at the car, that the radiator cap was off of the radiator and it was laying on top of the neck and it had depressed an indention into the insulation of the roof of the car. Antifreeze was poured all over the engine and it was running down on the ground and all over the engine compartment.

We contacted Kia of America on his behalf and we stated the case. They ruled and declined that it was lack of maintenance or negligence on the customer's part. He was advised to contact his insurance company. He did. I wasn't aware of the first decline. The second time or the only time I was aware is when Central Kia of America advised him to contact them that a representative of his insurance company came out, they looked at the car, they agreed it was negligence, and they offered to pay the bill. He had a \$500 deductible and he owed that \$500. That's where the \$500 came into play.

The part that he's talking about on bringing

the car back, the car had sat there from June till November and antifreeze laying in the oil had pitted the cams. We had sent the heads over to the head shop, they had worked on the heads, and at the time they did not, by the naked eye, detect these pits. It caused a rough idle. We sent the head back over, put him in something to drive, and the head shop worked on the heads, got them put back in correct order. We reinstalled them, told Mr. Hicks his car was ready, that he had to pay his \$500 deductible, and we requested him to come pick his car up and pay his deductible and the car was ready.

Every part that was on his car prior of this failure is still on his car, same radiator cap, same radiator, same hoses, belts, the only thing that's new or different is the head and the internal parts where it blew a head gasket and we replaced those by his insurance recommendation. I don't think insurance companies these days are going to pay a dime without them realizing they're at fault, and they realized fault here and they made good for it.

And the car, it was asked how is it running at the last hearing, he has no issues, no problems, the car is repaired, it's drivable, it's roadworthy, and therefore, I don't see that Central Kia would owe for his deductible which his insurance company was well aware that

he should pay that. And I ask for this decision to stand as the ALJ said it would.

Thank you.

MR. VANDERGRIFF: Thank you.

Any questions? Mr. Campbell.

MR. CAMPBELL: Yes, sir.

Mr. Wiley, you said when he came to your service shop you looked at it right then. Was he present when you opened the hood and looked at it at the service shop?

MR. WILEY: He rode in with the wrecker, and he came inside. We went out to look at the vehicle and then took Mr. Hicks out to the car and showed him this. Then shortly after that, I was inside of the write-up booth area, shortly after that, Mr. Hicks walked up through the cashier and through the showroom floor and asked to speak with me, and I was out on the service drive, so I excused myself and went up and sat down with him.

That's when he was asking that he did not have the money to repair it, he said it had to be covered under warranty, and that he would appreciate anything I could do for him. And I presented it to Kia and Kia of America is the one that declined the claim.

MR. CAMPBELL: But at that time you had opened the hood in front of him? At the time he brought it to

1	you or when he brought it on the wrecker, you're saying
2	that the radiator cap was already loosened, antifreeze was
3	out, and he saw that at the same time you did?
4	MR. WILEY: I don't recall if it was the exact
5	same time. I don't recall.
6	MR. CAMPBELL: Okay.
7	MS. RYAN: Can I ask for clarification. What
8	insurance company? Is this collision? What type of
9	insurance company paid for an engine?
10	MR. WILEY: Texas Farm Bureau.
11	MS. RYAN: Okay. So it was an extended
12	warranty.
13	MR. WILEY: Automotive.
14	MS. RYAN: Okay. They paid.
15	MR. WILEY: They recognized that there was I
16	don't know what they call it.
17	MS. RYAN: I just wanted to confirm what type
18	of insurance. I understand. Thank you very much.
19	MR. VANDERGRIFF: Any other questions?
20	(No response.)
21	MR. VANDERGRIFF: Okay. Thank you.
22	Oh, you do have another. Excuse me.
23	MR. CAMPBELL: I do have a question for the
24	Complainant. You indicated that you had the car in for an
25	inspection or oil change or something and no one touched

1 it for the next six months. Is that what you said? 2 MR. HICKS: Yes, sir. The facts are these: had the oil changed by someone other than Central Kia on 3 4 January 11, 2009. The car passed a state-required safety vehicle inspection mid May of 2009. The second breakdown 5 occurred six weeks later, June 27, 2009. 6 MR. CAMPBELL: So you're saying you had your 7 oil changed in January 2009, and not again until June 8 9 2009. Is that correct? 10 MR. HICKS: Yes. 11 MR. CAMPBELL: So you drove the car basically 12 six months at 50 miles a day. MR. HICKS: Yes. I drove the car, because I 13 live in Dallas and I -- I'm sorry -- I live in Richardson 14 15 so I have to drive downtown Dallas, and that's approximately 50 miles each day. And again, I went to 16 Abilene, Texas and Houston twice allegedly during the time 17 that the radiator cap was off the radiator. 18 19 MR. CAMPBELL: But you never changed the oil during that six months driving that much? 20 MR. HICKS: No, I did not change the oil, sir. 21 22 MR. CAMPBELL: Okay. Thank you. 23 MR. HICKS: And the facts are these as to when I brought it back the second time. When I brought it back 24

the second time, I had it towed. I went to a service

assistant and I said, My car broke down again just like it did the last time. I then went inside where he customers sit. While I was inside where the customers are sitting, the service technician went outside by himself, he opened the car hood, he did whatever he did. Five minutes later then he comes and gets me and he says, Mr. Hicks, I want you to follow me.

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As we walk out to the car, he says, Someone left the radiator cap off the radiator and this might not be covered. He then opened the hood back up, he reached down, he unscrewed the radiator cap, he took it off the radiator and said, See, this is what I mean. But when he brought me to that car, that radiator cap was on the radiator.

MR. CAMPBELL: When you looked at that radiator cap and it was on the car, did you see any radiator fluid?

MR. HICKS: I saw streaks of radiator fluid, but radiator fluid was not dripping down from the radiator, there was just a few streaks. And I know what I'm talking about because the first time that the car broke down, a hose had blown up, a hose had ruptured, and there were white streaks all over that vehicle engine then, but this time there were only a very few streaks.

MR. CAMPBELL: Was the motor cool by the time it got to the shop? Was it cold or cool or hot?

1	MR. HICKS: I think the motor was probably cool
2	by the time it got to the shop.
3	MR. CAMPBELL: So if he would have taken the
4	radiator cap off at that time, probably antifreeze
5	shouldn't have gotten out.
6	MR. HICKS: No, it wouldn't have gotten out and
7	it wouldn't have boiled up.
8	MR. CAMPBELL: And it did have antifreeze
9	showing before he took that radiator cap off?
10	MR. HICKS: When he opened the door, again, I
11	noticed a few streaks, a few white streaks.
12	MR. CAMPBELL: Okay. Thank you.
13	MR. HICKS: If I can address another issue too
14	as to the issue of the additional \$500.
15	MR. VANDERGRIFF: We need to make sure you've
16	got just a couple of minutes.
17	MR. HICKS: Okay. Thank you.
18	This matter is controlled by contract law. The
19	invoice constitutes a contract between the dealer and
20	myself. It clearly states what services he provided and
21	the cost of those services. That contract was in the
22	absolute control of the dealer. There is no question as
23	to how much those repairs cost because the dealer put the
24	cost on his own invoice.
~ F	

Even if the dealer made a mistake and didn't

include the \$500 deductible, it is well settled law that 1 2 any mistakes or ambiguity in a contract is resolved against the drafter of the contract. The dealer can't put 3 4 a sum certain on that contract and then I perform that contract by paying what they demanded I pay and then later 5 change the terms and conditions of that same contract. 6 MR. VANDERGRIFF: Any additional questions? 7 MR. WALKER: Mr. Bray, the case is styled Leo 8 9 Hicks v. Kia Motor Company, however, the first paragraph 10 says that he filed a complaint against Poulos Automotive 11 Group. That's two different people. Why is that? 12 MR. VANDERGRIFF: That's the legal name of Central Kia. 13 MR. WALKER: But Central Kia is not the suit. 14 15 MR. VANDERGRIFF: Because you normally would sue the company that you have the problem against. 16 MR. BRAY: I can tell you why the case is 17 styled the way it is. The statute only provides the board 18 19 jurisdiction over two things: the Lemon Law and other 20 warranty enforcement. The warranties are provided by car manufacturers and distributors like Kia Motors. If a 2.1 22 complainant comes to the Department of Motor Vehicles 23 complaining of a factory warranty issue, it's the factory

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MR. WALKER: But his complaint was filed

that is the party respondent, not the dealership.

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against, it says here, Poulos Automotive Group dba Central 1 2 Kia. Who did you file the complaint against? MR. HICKS: I think I filed it as you mentioned 3 4 I did, but I think this is covered by agency law too. Central Kia is an agent of Kia Motors of America. 5 MR. WALKER: It would be a franchise. 6 7 MR. HICKS: Yes, because they granted Central Kia a license to do business. 8 9 MR. WALKER: So how did we get -- okay, help me 10 out. 11 MR. BRAY: Let me try another angle, and that 12 is we don't treat franchised dealers as agents of 13 manufacturers for purposes of the Lemon Law. I mean, that's the whole purpose of the Lemon Law. 14 MR. WALKER: We don't have a Lemon Law case 15 here, do we? 16 MR. BRAY: Or warranty performance issues. 17 what can happen is this would not be the first time in 18 19 history that a complainant comes to the agency and he or she is assisted in framing the complaint correctly and 20 getting the right party before the agency. It probably 21 22 would have never been heard at SOAH if it had been the 23 dealership as the party respondent. And if you go through the complaint in total, it's about honoring the warranty. 24

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MR. VANDERGRIFF: Mr. Harbeson?

MR. HARBESON: Yes, sir. Maybe I can answer the question. I think this was originally filed with the Enforcement Division as a complaint against the dealer. The investigator looked at it, saw that we didn't have jurisdiction on the enforcement, but because it was a warranty issue, the case was referred over to Consumer Affairs Lemon Law to handle the case. So that's how it was originally styled against the dealer.

MS. RYAN: Mr. Hicks brought up several, in his opinion, concerns with legal issues with the ALJ. In your legal opinion, is there anything to be concerned with with the documentation that wasn't filed or any of the other pieces that he brought up? Should we consider any of that, or has that been reviewed?

MR. BRAY: Really, I'd like to say you could but you really can't. Those provisions that he's referring to are the rules of practice and procedure for a different agency, for SOAH, and we have no real say in how they administer the provisions of their statute and their rules.

MS. RYAN: I just didn't want it to go without clarification. Thank you.

MS. JOHNSON: I have a question for the gentleman from Central Kia, please. I've never heard of a car just turning off because it's overheated. The

1 thermostat goes red, smoke pours out, and I've never had 2 an engine just turn off for that reason. Can you address that for me, please, sir? 3 4 MR. VANDERGRIFF: Make sure and come to the mike. 5 MR. WILEY: Yes. What it does is the 6 7 antifreeze goes out of the car so fast that there's nothing in there to lubricate it, and when that happens, 8 9 then it locks up the motor. 10 MS. JOHNSON: But you have plenty of time to 11 see that happening. I've blown several hoses, I've had 12 loose radiator caps, and there's steam that comes out of the hood undeniably well in advance of that fluid being 13 gone unless you've got a gaping hole in your radiator. 14 15 MR. WILEY: Right. MS. JOHNSON: So address that one. 16 MR. WILEY: What it is is the radiator cap on 17 there, it was discussed at the hearing, and what it was 18 believed to believe that someone -- because Mr. Hicks said 19 20 that he had not checked his fluids but he did say that he had several invoices where he had had it at Firestone and 2.1 22 they had been changing his oil, topping off his fluids. 23 When you tighten that radiator cap --MS. JOHNSON: I'm familiar with that. 24

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MR. WILEY: -- when you check the fluids, it

screws on. How long it will stay on there without coming off, no one knows.

MS. JOHNSON: You mean if it's not tightened down properly because you have to push, hold down and push and turn.

MR. WILEY: Right. If it's just screwed on to that first catch and it wasn't pushed down and twisted around to the safety catch, then that radiator cap will sit there for a period of time till it finally loosens up enough to come off. When it comes off, there's a hole that big, and the water pump, under pressure, will just push the fluid out of the top of the radiator.

MS. JOHNSON: But don't you still have steam?

MR. WILEY: He said he saw steam. If you'll look in the first hearing, all that alleged he had steam.

MS. JOHNSON: Well, then I guess my question is going to be for Mr. Hicks then. Did you see steam in advance of the car cutting off?

MR. HICKS: (Not at a microphone.) No, absolutely not. The first time that car cut off, again, I was on the highway, there was no sign whatsoever of a problem. There was no steam coming out of the car, the warning lights didn't flash in the car, nothing. The car simply stopped. The second time it stopped, it was the same facts and conditions. There was no pre-warning

whatsoever, there was no steam coming out of the car, there was no warning lights.

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What I said at the hearing is after the car stopped I saw steam coming out of it, but not before.

MS. JOHNSON: Thank you. I recently had a car just turn off and it was not from a blown radiator cap, but I still had five or ten minutes of unusual activity prior to that happening. So what other reason would a car just turn off?

MR. WILEY: What Mr. Hicks stated in the hearing was that he was going down Central Expressway -- which is a highway just like 35 here -- and he was running highway speed which is 60 miles an hour. By the time he got off of the highway, over to the side and was able to stop, then he started seeing the steam. Well, going down the highway, the wind catches all that and pushes it under the car, it doesn't bring it up through the hood to the windshield. And then by the time you get it over and get it stopped, then he said the car quit.

MS. JOHNSON: I thought he said that the car quit while he was driving it.

 $$\operatorname{MR.}$$ HICKS: That is precisely right, ma'am. The car quit when I was driving it.

MS. RYAN: Can I add? It does say in here that Mr. Hicks testified on June 27 that he was driving on

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1	Central Expressway when the vehicle began to smoke. I
2	wasn't there but it does say that you testified to that.
3	MR. VANDERGRIFF: Mr. Gillman.
4	MR. HICKS: May I address that?
5	MR. VANDERGRIFF: Let him ask his question and
6	then you can come back.
7	MR. GILLMAN: Where is Mr. Bray? Question,
8	what exactly first of all, Mr. Hicks, is your car fixed
9	now?
10	MR. HICKS: It is fixed.
11	MR. GILLMAN: What exactly does he want at this
12	point in time?
13	MR. BRAY: Actually, I'm having trouble
14	answering this because I am not him, but I would guess
15	that he would like to be made whole.
16	MR. GILLMAN: And making him whole would be
17	\$500?
18	MR. BRAY: I think so.
19	MR. GILLMAN: Is that correct?
20	MR. HICKS: In the alternative, yes.
21	May I respond?
22	MR. VANDERGRIFF: Yes, please.
23	MR. HICKS: Regardless as to what the
24	transcript may read, that is not my testimony. The car
25	did not smoke prior to it stopping, the car gave no

1	indication whatsoever of a problem, either during the
2	first breakdown or the second breakdown. There was no
3	reduction in performance of the car, there was no fluid
4	emanating from the car, there was no sounds, there was no
5	warning, there was no lights, nothing. Both the first
6	time and the second time the car simply stopped.
7	MS. RYAN: Thank you.
8	MR. WALKER: I have one real quick question.
9	Was the car still covered under warranty?
10	MR. WILEY: The car was covered under the power
11	train warranty, yes, sir.
12	MR. WALKER: So it still had power train
13	warranty.
14	MR. WILEY: Yes, sir.
15	MR. WALKER: All right. Thank you.
16	MR. VANDERGRIFF: Any further questions?
17	(No response.)
18	MR. VANDERGRIFF: Thank you very much.
19	I'd be pleased to submit this matter to the
20	board. Mr. Walker.
21	MR. WALKER: I don't know that we've seen any
22	different to overrule the SOAH here. I'd make a motion
23	that we accept the SOAH ruling because I don't think
24	there's anything that's changed that.

25

MR. VANDERGRIFF: We have a motion. Do we have

1	a second?
2	MR. RUSH: Second.
3	MR. VANDERGRIFF: Second by Member Rush.
4	MR. VANDERGRIFF: Do we have any further
5	discussion?
6	(No response.)
7	MR. VANDERGRIFF: I'd call for your vote please
8	to approve the motion. All those in favor please raise
9	your right hand.
10	(A show of hands.)
11	MR. VANDERGRIFF: All those opposed.
12	(A show of hands.)
13	MR. VANDERGRIFF: The motion carries six to
14	two, with Board Members Gillman and Johnson voting against
15	the motion and Board Member Rodriguez being absent, all
16	others voting in favor of the motion.
17	By the way, I do want to note that Member
18	Johnson is not contagious, although I'm noticing as a
19	precautionary measure, Member Rush is taking
20	furious moves.
21	MR. GILLMAN: No. Gillman.
22	MR. VANDERGRIFF: Gillman. Why do I say Rush?
23	(General talking and laughter.)
24	MR. VANDERGRIFF: I'm not sure why I'm having
25	the slip of my brain either.

I would like to note we're on to agenda item number 4, which is the administrative updates.

We had some of this discussion yesterday. I'm not sure that I was clear certainly for the record for our public meeting today, board meeting, that I did testify before Senate Transportation yesterday and repeated many of the same sentiments that I echoed at the House Transportation meeting in September. So I just wanted to note that. That copy is available, testimony is certainly public.

And obviously the three main themes of my discussion continue to be, and the board adopted those at the last board meeting, was that we needed to do all we could to be severed from TxDOT, we needed to establish a more retail oriented outlook to our business, and look to be an economic development generator which would be positive income going into Fund 6 and for the support of our industries.

So with that, I will turn it to the executive director if he has any reports other than the items that are listed on the agenda which we'll get to here in a second.

MR. SERNA: Just a few quick things to report to the board as a whole. First of all, I'm pleased to report that we have posted several vacancies in our Office

of General Counsel, Administrative Services, and the Human Resources Division and in Finance. In addition, our CFO has hired a budget manager. That individual will begin posting positions there, so soon we'll not just have two or three people trying to put all the budget and all those other documents together.

We've also brought onboard, and I think we mentioned this last time, but if not, we've also brought onboard an HR manager, so we will begin and we have already started transitioning those HR policies to become TxDMV policies. In some cases we may bring some of the policies before the board, but in a lot of cases they're just internal administrative policies that we'll be changing, but we will be more clearly identifying our identity in support of the statements and the direction that the chairman and the rest of the board has given us, identifying our separate identity.

Also, with regard to facilities, our existing facilities, not new facilities, our existing facilities, we have started making progress towards rearranging staff and getting them relocated and reseated so that they are more in line with their new divisions. We've actually had good support from the Texas Department of Transportation's facilities and shop area at building out offices, setting up cubicles, and then they'll be providing the staff or

the contracts to physically move our employees.

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I'm also pleased to report that in San Antonio our regional office was successfully moved to a new location. You may recall that we needed to move out of the TxDOT facility, there were some facility problems. They've moved into a new location and they're up and running and the public seems to be satisfied and the staff is satisfied. It's a very nice facility, not very far, just a couple of miles from the old facility.

In Fort Worth, or Arlington, rather, the regional office there is also moving to a new facility.

There were facility problems with where we're at as well as security problems. We started moving the beginning of this month and we're on target to complete the move of our Arlington regional office.

One other thing I want to point out to the board is we will be conducting a survey of employee engagement. State agencies are required to conduct what used to be called a survey of organizational excellence, now it's called a survey of employee engagement. We contract with the University of Texas's Institute of Organizational Excellence. They'll begin the survey on the 19th. It's a completely anonymous survey, and I'll make sure we get the survey questions to the board, we'll e-mail them to you today. I meant to have them here but I

didn't bring them. I apologize. But we'll get those to the board.

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But it's an anonymous survey. The employees will be asked questions concerning internal communications, their understanding of the agency's direction and how their role fits with that direction, what they perceive to be their opportunities in the department for advancement and for engagement and participation and responsibility and accountability.

We'll get these results back from the
University of Texas probably in the December time frame.
Two things happen with the results. First of all, at the
request of the legislature -- and this happens every
biennium -- the University of Texas presents a statewide
picture to the legislature because there are about 100
agencies and universities whose employees respond to this
survey. UT will present a picture to the legislature
concerning the condition of state employees' engagement in
their agencies. They will also present us, the staff, and
we'll present to the board how we did relative to the
state but also how we did internally.

It's my intention to establish in those areas where we appear to be weak or lacking, it's my intention to actually establish formal plans that we'll present to the board and report regularly on on how we're improving

those areas where our employees feel that maybe we're a little lacking or they're not getting some of the support that they need.

But I won't have anything to report until we get the results back from UT which probably won't be till about the December time frame, and it will be based on whether we get the results before or after the December meeting. If there is anything in the interim to report, I will certainly provide reports there to the board.

The last thing I want to do is ask Linda

Flores, unless there are any questions on any of this, ask

Linda Flores to come up and provide a quick summary of our

Fiscal Year 2010 and 2011 financial statements, and 2011

we're a month and a half into.

MR. VANDERGRIFF: Can I make a request that we make sure if we're going to do that that we include that as an item on the agenda so it's clearly noted for the public.

MR. SERNA: Yes, sir. I will do that.

MS. FLORES: Hello. For the record, my name is Linda Flores. I'm the chief financial officer for the department.

In your board book you've got a document that is still evolving, I would say. The information that we're presenting to the board contains data elements that

you're still familiar with, but we're trying to provide some highlights on our agency performance for the month that we provide information to you.

We're in the midst of transitioning between Fiscal Year '10 and Fiscal Year '11.

MS. JOHNSON: Excuse me. I don't think it's appropriate for you to be giving us this report since this is not agendaed. If you would please stop. If this can be agendaed under the audit, that might be appropriate, but it is absolutely not appropriate under Open Meetings Act.

MR. SERNA: It's part of the executive director's report. This is simply a report, not a standalone agenda item.

MS. JOHNSON: Then I would defer to the rest of the board. I just don't see that this is appropriate since it's not specifically agendaed as a budget report, and there's a difference between an executive director report and a financial report, big difference. Unless you want to give the report for her.

MR. SERNA: I'll defer to my general counsel.

MR. BRAY: In our view it's the reverse, she's giving the report for him. And it's certainly the board's prerogative. I'd have to agree with Mr. Serna that it's allowable for him to delegate her to give this report, but

that's certainly the board's prerogative.

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MS. JOHNSON: I've never heard the financial report to be part of the executive director's report before, it's always been a separate agenda item in every other board meeting that we've had.

MR. VANDERGRIFF: I understand. I believe it is my choice. I noted before this started, without making those comments, that this should be a separate agenda item, so I echo the concerns that Vice Chair Johnson has evidenced. Having said that, I think the information can come in based upon that it's the executive director ceding some of his time for a report, not for an action item, and I believe this information the board should hear. We won't make that agenda mistake again, we'll be clear next time out, but I certainly expect you to go ahead.

MR. SERNA: Go ahead, Linda.

MR. VANDERGRIFF: I want the record to reflect that Vice Chair Johnson has left the room believing that it violates the Open Meetings/Open Records Act by participating.

MS. FLORES: Well, if I could refer you to the material in the three-ring binder that you have in front of you. The material provides information for the agency's fiscal year ending August 31 and the first month of September Fiscal Year 2011.

As I mentioned before, the material is still evolving, we're trying to find the right format for the board's review every month for the fiscal year ending, new year beginning, so if you all have any kind of feedback to provide, I'd really appreciate that.

For Fiscal Year ending 2010, that year the accounting books are still open. We're in the middle of creating our annual financial report that we have to provide to the Comptroller's Office. That report is not audited other than by the State Auditor. That information is due to the Comptroller November 20. So the information that I provided is still very preliminary.

So with that, I'll just give you some basic highlights. For Fiscal Year 2010 the agency collected over \$1.1 billion in registration fees for State Highway. Our expenditures are approximately \$107.7 million, and it left available budget balances of approximately \$70 million. A lot of that was dedicated, as you all know, for Vision 21 project and some capital items that were not spent.

Pages 5, 6 and 7 is information related to Fiscal Year 2010 that you've seen before, and it's just the detail of those highlights.

MR. CAMPBELL: Linda, if I could, could I ask a question, or just a comment. On page 4 the ABTPA grants,

it's showing \$5.6- but in your discussion it's actually approximately about \$3 million.

MS. FLORES: Yes, sir, that's part of the accounting books still being open. We still have payments that as of yesterday I know that cash that hasn't been spent for those grants is approximately \$3.6-. So while this information reflects unspent balances of \$5.6-, payments have been made, and so specifically for those grants, Mr. Caldwell has until December, I believe, to get those payments out the door. We will show those available balances as an encumbrance which is the state's way of obligating those dollars so they're not spent on anything else.

Fiscal Year '11 begins on page 12, and it's only for the month ending September 2011. Our budget, as you know, for FY '11 is \$200.8 million and it includes a lot of those carry-forwards that we've estimated in the past. Our estimated revenue for the year is approximately \$1.19 billion. We've also pledged a 5 percent general revenue reduction, \$727,000. Our expenditures for the month are \$7.3- compared to the same time last year of approximately \$3.7-. And again, you will see information that you have seen before on pages 15 and 16 and 17.

I'm trying to make the spreadsheets a little bit easier on the eyes and I will continue to do that. I

know sometimes the numbers get a little small and 1 difficult to read. 2 And with that, I'm available to answer any 3 4 questions. 5 MS. RYAN: Can you explain the differences in 6 the year-over-year expenditures? 7 MS. FLORES: I'm sorry. What the categories or differences MS. RYAN: 8 9 in the year-over-year expenditures would be, \$7.3- versus 10 \$3.7- in September of '09. 11 MS. FLORES: Well, in September 2009 which is 12 our last fiscal year, I think there might have been just some delay in spending because the agency was almost in 13 the midst of their transition which occurred in November. 14 So September and October and November last year were 15 probably transitioning months for the agency, so that 16 could have been the reason. Now we're ramping up. 17 MR. CAMPBELL: I think employee-wise. 18 MR. VANDERGRIFF: I think Dawn can probably, 19 20 since she was here. Linda has done a great job but she's speaking from something where she wasn't with us at that 2.1 22 point in time. 23 MS. HEIKKILA: For the record, my name is Dawn Heikkila. I'm the chief operating officer for the 24

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department.

During the months of September and October in Fiscal 2009, the divisions that were transferred to create the department were still part of the Department of Transportation, and as such, part of the expenditures we realized as an independent agency would have been absorbed by other divisions within the Texas Department of Transportation. So the expenditures still occurred, they were accounted for differently.

Does that make sense?

MS. RYAN: It does. And are we going to see this continuing through, and if so, is there a way to get kind of a percentile that we had \$3.7- and TxDOT had, so that we can get a feel for are we actually spending more or less year over year which would create a baseline?

MS. HEIKKILA: Identifying expense data from the Texas Department of Transportation has been a challenge prior to transition through transition and it continues to be one of our big challenges, and it has a lot to do with the way that they record their transactions. So getting an apples-to-apples comparison is going to be difficult.

Additionally, you're going to see spikes in expenditures for the various expenditure categories as we transition and ramp up, bringing staff on, adjusting for facilities, taking over our own support pieces. Initially

during the Fiscal 2010, the MOU provided that a lot of the 1 2 consumable supplies the agency used came from TxDOT, it was like an in-kind contribution, so there wasn't actually 3 4 a cost associated with those supplies. We're kind of peeling that support away during Fiscal '11 and taking 5 6 more responsibility for those types of transactions. 7 That's going to cause a difference in the expenditure levels as well. 8 9 MS. RYAN: I understand. If one of our goals 10 is efficiency and cost reduction, then creating some form 11 of a baseline would just be important, understanding it 12 might not be exact, but it's hard for us to understand are 13 we headed in the right direction or not without some form 14 of quantitative measure there. 15 MS. HEIKKILA: Right. And I believe going forward that the thought is going to be doing a month-to-16 month over/under comparison for each of the expenditure 17 categories so you can kind of get a feel. 18 19 MS. RYAN: Where it's coming from. MS. HEIKKILA: Right, and what the trends are. 20 21 MS. RYAN: Okay. Thank you. MR. VANDERGRIFF: Do you have any further 22 23 questions of Ms. Flores on this? 24 (No response.)

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MR. VANDERGRIFF: Thank you very much.

MR. SERNA: That's all I have, Mr. Chairman.

MR. CAMPBELL: Mr. Chairman, maybe one question. I don't know if this is the appropriate time either, but I guess it would be under Ed's or Linda's category under the State Auditor Report.

MR. SERNA: We have an agenda item, sir.

MR. CAMPBELL: Okay. I'm sorry.

MR. SERNA: That's fine.

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MR. VANDERGRIFF: All right. I would note that we're back now on agenda item 4.B on legislative priorities, and the vice chair has rejoined the meeting.

I do want to note one quick thing before turning it over to Ms. Johnson is just to note that I mentioned earlier today when we started the meeting about having this discussion as a part of our agenda on November 9. I'm going to charge the staff and certainly the industries and the board to make sure that we have everything compiled by the close of business on October 28 so that we can have that out to folks in time to be prepared to make comment, because I recall that I noted that we would ask that members of the public or the associations or industries involved, particularly if they have questions or concerns or requests for additions or deletions, that those be brought up. I think that's a fair discussion for the board to have.

And those would be, to make sure I'm clear, what we refer to as DMV cleanup which is off of House Bill 3097 and also what we refer to as Vision 21 which is Senate Bill 1507 from the previous session. They will certainly be renamed something else going forward, but those are working titles.

I think it's also appropriate, as the staff is going through the LAR process, there may be some desire to -- it may not be but I'm just noting that -- there may be some desire to address any potential modifications to that that I think the board should be apprised of, so we'll make that a part of this discussion.

We adopted at our last meeting kind of the philosophy of the testimony and the proposals I made to both the House and Senate, so hopefully we'll have a little more meat on the bones of those by this meeting that we'll be able to share with you. And then also some of the things that we've discussed in our open session yesterday and maybe some others that will bubble up regarding any potential rulemaking or statutory challenges that we might discuss. I know we had the discussion on contested cases that I think we might put that on this agenda as well.

So we'll get all that. It will be a busy, full time on November 9, but we'll have those out for

1	discussion. And we'll expect industry participation in
2	that would certainly help the board coming to some
3	decisions.
4	So with that, I'll turn it to Ms. Johnson.
5	Mr. Gillman, do you have a question of what I
6	said?
7	MR. GILLMAN: I do. You're asking for industry
8	participation. Are you giving them some kind of document
9	to look at?
10	MR. VANDERGRIFF: Yes. They will have that
11	within ten days before.
12	MR. GILLMAN: Can we not get that same
13	document?
14	MR. VANDERGRIFF: Absolutely.
15	MR. GILLMAN: We want to have a little input
16	too.
17	MR. VANDERGRIFF: I'm sorry. That was a given
18	that you would have it. I apologize for not making that
19	clear.
20	MR. GILLMAN: No problem. Thank you.
21	MS. JOHNSON: And I guess with that said, I
22	need to ask for clarification. It's my understanding that
23	staff will have documents, final draft documents for me to
24	provide to the stakeholders, both that we've already met
25	with as well as the ones we have yet to meet with, at

1 close of business Monday?
2 MR. WALKER: The 28th.
3 MS. JOHNSON: No. Thi

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MS. JOHNSON: No. This Monday because then I have to take those issues, take them out to the stakeholders, get feedback, and then summarize those, and I will provide those issues that the various stakeholders raised and questions — as we're receiving them, I'm submitting them, and I hope to have all those questions addressed so that when I provide you a table for the next agenda that you'll have the bill, the different stakeholders, what issues or questions that they had, and then there will be some votes that will need to be taken by the board to take a position on some of the issues.

 $$\operatorname{MR.}$$ GILLMAN: But what I'm saying is we want to be part of the stakeholders.

MS. JOHNSON: Oh, absolutely, yes.

MR. GILLMAN: In other words, as soon as whoever gets their information, we want that information.

MR. VANDERGRIFF: Right. When she has this cleanup, she'll send you copies as well. Just be aware of what you wish for. It will have a bill analysis which is good, but a couple hundred pages.

MR. GILLMAN: The 58-page one is the one I'm interested in.

MR. VANDERGRIFF: All right.

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MS. JOHNSON: He wants the little one.

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MR. VANDERGRIFF: But you've got to take the

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sweet with the sour, so you get to have the 280-page one

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too.

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MS. JOHNSON: And I'm not going to go through

what I did yesterday, because I think most of the people

here today were also present yesterday. And Mr. Walker, I

will bring you up to speed.

Ms. Giles and I followed the direction of the

board and we did go and visit with all those stakeholders

that we were able to meet with and presented some rough

information on these two bills that we're still referring

to as 3097 and 1507, and had wonderful discussions with

The e-mails and letters that have come back since them.

those meetings are that they do believe that this is the

first time in the history of a state agency that we

actually went to the stakeholders and said what do you

think in advance of a session rather than bumping heads in

the session.

And so they were wonderful meetings, they're

very appreciative, and it's my hope to continue that good

relationship because that's what we're here for, for our

citizens and for our stakeholders and industries.

So just as quickly as I can get that

information to you, I will, so you'll have plenty of time

1 to review it, and any questions you have you can address 2 to me or Ms. Giles, as much as possible so that we can pull them all together and then send them to the 3 4 legislative team in-house so that your concerns and questions can be addressed as well in advance of the 5 6 meeting. Then we'll expect a lively discussion at the 7 next meeting regarding some of the legislative issues. MR. VANDERGRIFF: Great. Thank you. 8 9 Other questions on this one? 10

(No response.)

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MR. VANDERGRIFF: At our workshop we had some discussions of varying lengths, I'm on item 4.C at this point, and I do not know if any board members wish to bring any of these items up for any discussion and possible action, so I will open that.

Seeing none.

MR. BRAY: Excuse me. I have one item.

MR. VANDERGRIFF: Sure.

MR. BRAY: And it's back under the administration of cases, and I left it for today. I think I mentioned this to you, I left it for today for Mr. Walker's benefit that I owe him an answer from the August board meeting where he was inquiring about proxies.

And at that time, of course, I always tend to kind of want to err on the board having authority do

things, and at that time I was hoping I could give him a yes answer, but I begged off a little bit. My research is that it's 180 degrees opposite of the private sector and the corporate world where there are millions of proxies every quarter that happen. In state government, according to what I understand from attorney general opinions, you may not proxy your vote at all ever.

MR. WALKER: Thank you.

MR. GILLMAN: Fairly clear.

MR. VANDERGRIFF: Thank you for that clarity.

With that, I'll move into agenda item 4.D, which is the organizational assessment, and we had discussion on that yesterday. Mr. Serna.

MR. SERNA: At the last board meeting the board tasked me with providing a plan at this board on a way to conduct an organizational review of the department by an independent outside firm. The department is getting ready to complete its first year of operation. That first year was primarily focused on transitioning and setting up the high level structure that supports the DMV's primary operating goals.

Staff is recommending that we contract with an outside firm to conduct an organizational assessment that will quickly -- and by quickly I mean in less than six months, so six months is the absolute outside -- review

the following areas: the existing skill sets of management and staff; organizational structure and internal lines of communication; planning and resource allocation, and by that I mean the processes that we use for defining program area budgets and the allocation of resources, staff, money, infrastructure, et cetera to support the program areas; management reporting, the current management identified current management reports and needed management reports, and that also includes reports to the board that are necessary for monitoring the progress of the department; also look at the internal governance process for initiatives and budget, and by this I don't mean governance in regard to the board but I mean governance in the way that management decides priorities, priorities for IT projects for budget allocation, for resource allocation, et cetera, et cetera, et cetera; and then finally evaluating or establishing performance measures available or necessary for reporting the effectiveness of the department's operations to the board and to the public.

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I propose that the review result in recommendations to the DMV board and management on how the agency can improve its operations, enhance its staff skill sets, provide its staff and program areas with the resources and tools that improve operations and customer

service.

There are several firms available to provide this service and can be procured quickly off of contracts available at the Texas Department of Information Resources.

So the bottom line is staff recommends that we be authorized to proceed with contracting for a private firm to conduct this organizational review.

MR. VANDERGRIFF: May I ask if we can include in that, I'd like to appoint a couple of board members to work with you on that on the final product, and specifically appoint, if they'll do it, Members Ryan and Gillman to work with you.

MR. SERNA: Yes, sir.

MR. VANDERGRIFF: They're nodding their heads.

Mr. Walker.

MR. WALKER: I have two quick questions of you.

MR. VANDERGRIFF: If they're really

intelligent, I'll make a third member of the committee.

(General laughter.)

MR. WALKER: What kind of money are we talking about to do all these studies that you want to do? And number two is where do you find that money in our budget?

MR. SERNA: This particular review, just based

on some kind of preliminary examination, should cost less

than \$2 million, depending on the amount of time that we want to get things done. Most of the estimates that I'm getting is for about \$800,000 to \$1.2-. The money comes from, remember we've been moving forward from '09 to '10 and '10 to '11 an unexpended balance. This year's budget, if you recall, was approximately \$24 million that was carried forward from '10 into '11, and that \$24- had been moved forward from '09 into '10.

MR. WALKER: Now that I've got shaken up about the 2 million bucks, would you go backwards and tell me what we're going to spend the \$2 million specifically on? I see all of the agenda items here, but specifically what is that going to cover? Without getting into the details.

MR. SERNA: Yes, sir, I understand.

Specifically it's going to cover having a firm come in and assess whether we've got the right skill sets, both management and staff level, and then if not, what we need to do to enhance those skill sets. For example, you had asked me previously with regard to some technology staff, I'm thinking specifically after our visit to Virginia DMV, why can't we do some of the stuff using staff, and I had mentioned to you we don't have that skill set. That's just an example. I already know we don't have that skill set.

MR. WALKER: So why spend 2 million bucks if we

already know that?

MR. SERNA: I already know that one, I'm not talking about that, I'm talking about department-wide.

MR. VANDERGRIFF: I think we also need to have information about the structure of the agency, the potential functions that we might be called upon to deal with at some point in time and what our skill set is available to be able to do that, what would be the proper alignment of this agency going forward to meet all the immediate and future requirements that the legislature and the executive branch is calling upon us to do.

I think it is fairly, right or wrong on the dollars, fairly typical for someone in this kind of major position with huge expectations on some agency to have an independent study done. I'll also remind the board that the legislature, in setting us, expected an independent study to be done upon this board, and our sponsor, Representative Ruth Jones McClendon, has been looking for that since we started. She got one of two things she's looking for which was the State Auditor's review and certainly looking for the other. So I just make those points for clarification for the board.

MR. WALKER: Good enough.

MS. JOHNSON: And I want to ask, Mr. Serna, is this the same report that you referred to? We got some

wonderful notes from the LBB presentation on our LAR. 1 Is it the same document or effort as the business process 2 assessment that was referred to in the LBB? 3 4 MR. SERNA: No, ma'am. That one is a much more pervasive process that will include our stakeholders and 5 the processes that touch our stakeholders. This is less 6 7 about processes and more about are we structured appropriately, do we have the right reporting mechanisms, 8 9 do we have the right skill sets. And I'm not talking 10 about replacing people but if we're missing skill sets, 11 then there may be some training or some tools that we 12 need. Is our internal structure for allocating staff, IT, budget, one that it's line that supports the board's 13 direction? When it comes to asking us to enhance our 14

Then who is performing the MS. JOHNSON: business process assessment, since that's a separate thing?

right skill sets to do that?

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customer service, to be more retail-like, do we have the

MR. SERNA: A statement of work was just issued at the beginning of this week, so we'll wait for responses there.

MS. JOHNSON: Okay. So we don't have anybody doing that yet.

MR. SERNA: No, ma'am, but a statement of work

1	has already gone out and we're expecting then the
2	responses in the next 30 days.
3	MR. GILLMAN: So we have not contracted for
4	this yet.
5	MR. SERNA: For this, no, sir, we have not.
6	I'm asking the board for authorization to move forward to
7	do this.
8	MR. VANDERGRIFF: With you engaged in it.
9	MR. GILLMAN: Pardon?
10	MR. VANDERGRIFF: With you engaged in it, and
11	Laura.
12	MR. GILLMAN: I'm aware of that. But it would
13	appear to me, being kind of simple here, we're talking
14	about hiring an outside consultant to come in and assess
15	what we're doing.
16	MR. SERNA: Yes, sir.
17	MR. GILLMAN: Isn't that your job?
18	MR. SERNA: Yes, sir.
19	MR. GILLMAN: I mean, why spend \$2 million
20	unless you and I split it or something, I mean, you know.
21	MS. JOHNSON: He didn't mean that.
22	MR. GILLMAN: I'm joking, obviously. But I
23	mean, is this necessary? Does anybody else have an opinion
24	on that?
25	MR. VANDERGRIFF: Nothing in life is necessary

except death and taxes. Having said that, there is an 1 expectation that we would have an independent party to be 2 able to review this agency and where we're at today and 3 what levels we need to be at going forward, if indeed 4 there are other assignments to be given to us in the 5 6 future. 7 I do not like the dollar amount, you certainly would be engaged and maybe can do that differently, but I 8 9 think it's appropriate that we have an independent third 10 party.

MR. GILLMAN: And I respect your opinion, but I just thought somebody ought to ask.

MS. JOHNSON: And with that said, then is that not something that -- I know the State Auditor's Office typically is focused on money, but do they not also perform management audits, because that's essentially what this is.

MR. VANDERGRIFF: No, it is not.

MS. JOHNSON: No, totally different.

MR. VANDERGRIFF: Yes.

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MS. JOHNSON: And outside of their realm.

MR. WALKER: We have to post this and bid it, do we not? We don't go out and hire somebody, do we?

MR. SERNA: We can develop a statement of work and use contracts that are available to us at another

state agency, the Department of Information Resources. 1 2 MR. WALKER: Are we going to bid this deal out? MR. SERNA: We will get responses from several 3 organizations but we don't have to got through the more 4 lengthier request for proposal process. 5 MR. WALKER: The answer is no. 6 MR. SERNA: Right, we won't bid it through the 7 more lengthy request for proposal process, but we will 8 9 still evaluate responses, so it will be an abbreviated 10 bid. 11 MS. RYAN: And with involvement with Ramsay and 12 myself, then as we look at what is available to us and the dollars and the scope of work tied to those dollars, then 13 we'll have some input and some say before a decision is 14 15 actually made and we move forward. MR. VANDERGRIFF: That's correct. This is 16 17 almost just like posting. MS. RYAN: Right. At this point we don't know 18 19 what it's going to cost, right, yet? 20 MR. SERNA: Right. And the price estimate is an extreme case -- I'd informally, I didn't give them a 21 22 bid or anything, but I informally contacted a couple of 23 different firms and I got everything from \$600,000 to \$2 million. 24

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MR. WALKER: Without naming any companies, it

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1	used to be the Big Eight accounting firms?
2	MR. SERNA: Those are some of the firms that
3	I've contacted.
4	MR. WALKER: They do that kind of stuff.
5	MR. SERNA: Those are at the higher end, yes,
6	sir.
7	There's also a small firm out of Virginia that
8	does this. I'm not saying we would use that firm, but
9	those are some of the organizations I talked to, and I
10	talked to them informally and told them I would not hold
11	their cost estimate to them, that they needed to bid and
12	provide a formal response, I was just trying to gauge.
13	And like I said, I got everything from we can get it done
14	in four months for \$600,000 to we can get it done in six
15	months for \$800
16	MR. WALKER: The Virginia deal, is that the guy
17	who took us through the Virginia tour of the DMV up there?
18	MR. SERNA: He joined us on that tour, yes,
19	sir.
20	MR. VANDERGRIFF: Any further discussion?
21	(No response.)
22	MR. VANDERGRIFF: Again, we're just moving
23	forward to the next step, but I'd like to have someone
24	make a motion to approve moving forward on the
25	organizational assessment with Members Gillman and Ryan.

1	MR. RUSH: So moved.
2	MS. JOHNSON: I'll second that.
3	MR. VANDERGRIFF: We have a motion by Director
4	Rush and a second by Vice Chair Johnson. No further
5	discussion?
6	MR. WALKER: Are you sure that wasn't Rush to
7	did that?
8	MR. VANDERGRIFF: I said Gillman earlier.
9	That's why I said it very slowly, Gillman.
10	MR. GILLMAN: And looked at me.
11	MR. VANDERGRIFF: And looked at him.
12	(General laughter.)
13	MR. VANDERGRIFF: All those in favor, please
14	say aye.
15	(A show of hands.)
16	MR. VANDERGRIFF: The motion carries
17	unanimously. Member Rodriguez is absent at this point.
18	And with that, I will move to the State Audit
19	Office Benchmark Audit.
20	MR. SERNA: Very quickly, each of you received
21	an electronic copy provided by the State Auditor earlier
22	in the week of the review. We believe that the auditor
23	conducted a thorough examination of the resources that
24	were transferred to the department, as well as the
25	processes we have in place. You can certainly read the

auditor's summary. Bottom line is the auditor felt that generally we had received all the funds and resources that were due to us and that generally we were receiving the support necessary from TxDOT.

There were some items that they pointed out that we are already taking steps to address. Primarily in some of their test samples there were transactions that TxDOT processed for us that we had not proved in advance of them processing those transactions. Linda has already taken steps to work with TxDOT's financial division to make sure that doesn't happen again.

There was also a situation where in the sampling that they took some items in inventory were miscoded. One, we've already corrected, but two, we're putting processes in place and internally developing an automated mechanism for better tracking our inventory. I would like to point out, though -- this is sort of, in a sense, a defense of staff -- but that transition moved tens of thousands of pieces of equipment, and while we don't like any piece of equipment to get mis-categorized or lost, I did feel very satisfied, and the auditor expressed it as well, that the vast majority of that got moved over effectively and in a very quick period of time during the transition.

But what they did point out, the deficiencies

in our inventory area, we have already started taking steps to address and we gave ourselves some very aggressive deadlines for ensuring some of the checks and balances that they pointed out.

I think the third thing that they pointed out to us was we had a problem with some checks and balances of the individuals counting the checks and then also making the deposits. Part of that was because we had a staff of three available to do that, and we were overlapping functions just because we didn't have enough depth at the time, but we have taken steps to address that and ensure that that doesn't happen anymore. And that's one of the problems that we have already changed to make sure that the person counting the checks and logging them is not the same person setting up the deposit and making the deposit. We just made a few minor changes there, but we did make that change already.

Again, very quickly, the Auditor's Office was very supportive of us. Through their efforts they identified an additional \$99,000 that had not been successfully transferred to us from TxDOT, and that, in fact, was successfully transferred just based on their looking into it. So they were very helpful to us.

MR. VANDERGRIFF: Did we have a final meeting with the auditors? Have we had that?

1 MS. FLORES: No, sir. It wasn't necessary since we concurred with their recommendations. 2 MR. SERNA: The Auditor's Office chose not to. 3 4 MR. CAMPBELL: I think the report was very good and I think we come out looking pretty good. However, I 5 6 agree with the chairman, normally there's an exit review with the State Auditor, or at least in the business world 7 there's exit reviews that cover any kind of issues. 8 9 maybe because there wasn't such big issues other than 10 inventory, there really wasn't big issues, but I would 11 think in the future we would need an exit review with 12 them. In fact, I'd go a step 13 MR. VANDERGRIFF: 14 further. 15

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I think there's an opportunity, particularly for an independent board like this, that we need to be able to ask the question is there anything in this report or not in this report that we should know about or be able to talk to them. So I would request, certainly for myself and the vice chair and the chairman of the Finance and Audit Committee, that we have that opportunity.

MR. SERNA: I'll take the to-do to contact the Auditor's Office and see if I can arrange for an exit conference. Again, just to clarify, it was their choice, not staff's choice to not have one.

MR. VANDERGRIFF: And assuming we can do this,

1	by our general counsel, in the interest of time and
2	expense, we could do this by telephone as well, again,
3	assuming we can.
4	MR. SERNA: Brett, can we do that?
5	MR. VANDERGRIFF: We put him on the spot. If
6	we were having an exit interview with the State Auditor's
7	Office with a couple of board members, we could do that by
8	telephone, just having that discussion with them?
9	MR. BRAY: Depends on what you mean by a
10	couple.
11	MR. VANDERGRIFF: No more than three.
12	MR. BRAY: Yes, you may.
13	MR. VANDERGRIFF: All right.
14	Any questions on the audit? Mr. Serna?
15	MR. SERNA: That's all I have, sir.
16	MR. VANDERGRIFF: Okay. That's great.
17	The last item on our agenda is 4.F, which is
18	Franchised Dealer Service-Only Facilities. Ms. Cost.
19	(General talking and laughter.)
20	MS. COST: As if you didn't already know, for
21	the record, I'm Molly Cost, the director of the Motor
22	Vehicle Division of the department.
23	I have nothing prepared, I don't have anything
24	written prepared. I'm not exactly sure what you want me
25	to do. I can dive into something and try.

MR. VANDERGRIFF: Okay. Then let's just postpone this for the next meeting.

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MS. COST: I can talk about service-only facilities all day long, I just simply don't have any prepared comments. I can explain what the current law is and what the issue is that I think we want to discuss.

MR. VANDERGRIFF: Why don't we do that and then we can bring it back to the board in November for some issues. We'll go ahead, since it's on the agenda, to explain that.

MS. COST: Okay. What a service-only facility is, for those of you who don't know, franchised dealers, of course, not only sell new motor vehicles but they also do warranty service on them. And the statute was changed in 1995 and again in 1997 to make it clear that you have to be franchised and licensed to do this warranty service in order to do it. A dealer can't just open a satellite service facility, the manufacturer can't just appoint somebody who is not already licensed to sell the product to do warranty service work. It has to be an already established franchised and licensed dealer selling the product somewhere that's also going to do the service.

We don't have very many licensed service-only facilities. The vast majority of our franchised dealers do service at the same location that they do sales. There

are some that have them split just because of the geography of the property that they have available to them, and there are maybe a handful or less that have a true satellite where they do sales and service at a main location and then do service somewhere else.

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However, there are instances where there may not be, for a particular type of vehicle -- let's, unfortunately, take RVs for an example -- there may not be local dealers that sell that particular brand of RV but you have a person in northeast Texas that needs some warranty service work done. How do they get that? How do we make that convenient for them?

So I honestly can't remember exactly when this rule was put into effect but it was with our prior board. There was a service-only rule put into effect which made it clear that you had to be licensed in order to do service work at a satellite location but also allowed a dealer to contract with a third party to have them perform the warranty service on their behalf. So if there was a repair shop in a city where there wasn't a licensed dealer, they could contract with somebody to do that warranty work for the convenience of the customer.

Also, as those of you in the business know, the franchised dealer doesn't necessarily do every bit of the warranty services themselves. One of the examples that I

can think of is windshield repair. They may contract that out with somebody. They're perfectly able to do that as long as they hold a franchise from the manufacturer, the manufacturer reimburses he dealer, and then the dealer reimburses that third party for whatever warranty work is done.

The issue that we are experiencing right now is manufacturers discontinuing lines. When they discontinue a line, there are obviously still units that have been manufactured or sitting on dealers lots, need to be sold, there are units that have been sold to consumers that have warranties still on them, and what is, of course, happening is eventually the franchise agreements are either being not renewed, they're being terminated, either voluntarily or involuntarily by the dealers. How does the warranty service on these discontinued units continue? Some big examples, Saturn, Hummer, Sterling Trucks has discontinued GMC Medium Duty Truck.

So staff, I think we wanted to have a discussion with the board about how we deal with these issues because there are some dealers that are going completely out of business and they don't have other lines that they're also selling at their dealerships in order to keep those dealerships open, where is that warranty service going to go. How do we deal with this when we

164 1 have a statute that seems to indicate you need to be licensed and franchised to do this warranty service work? 2 Those provisions were enacted contemplating a continuation 3 of the manufacturing of the product, how do we deal with 4 that when those products are no longer being manufactured? 5 MR. VANDERGRIFF: And to make it a little 6 clearer too, at least the issue has been brought to me by 7 dealers, not manufacturers, but has been brought to me by 8 9 dealers who are concerned about the ability to service a 10 line. And they know the line is terminated but they're 11 looking to figure out how the consumer gets their work 12 done. MS. COST: And I've actually had a couple of 13 manufacturers ask me the question too, but vast majority 14 dealers. 15 MR. WALKER: Well, surely this isn't a new 16 17

Lufkin Trailers was a dealer here and manufacturer of trailers, they shut their doors, and yet they told us where to take our maintenance and warranty work, they hired somebody to do that.

MS. COST: Trailers are not covered under the franchise statute.

MR. WALKER: Okay.

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MS. COST: I mean, this is certainly not the first time this has ever happened, it's just the first

time it's happened to this extent where we're getting a lot of questions.

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MR. VANDERGRIFF: I guess is it from the board's perspective -- and correct me if I'm wrong -- maybe that the question before us would be would we want Ms. Cost to explore putting together some proposed rule from us which, of course, would go out for notice, comment and then adoption, so we're following that similar process that we do but she's bringing the question up to us. So we're almost getting an additional first step.

MR. WALKER: We're getting ahead of the game.

MR. VANDERGRIFF: We're getting ahead of the game, yes. But this is a philosophical question to address. Again, if we authorized her just to go forward to put together a proposed rule, it would be to allow for this kind of exemption/exception -- broaden that, if you will -- which means it would then go out for notice and comment. And then we'll have two bites at this apple, one right now and the second would be whether what she proposes in response to the question meets our desires. And then that would be published, the industry would comment, and then we'd have an opportunity to vote it up or down at that point.

Mr. Gillman.

MR. GILLMAN: Should we have comments now or

should we wait?

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MR. VANDERGRIFF: Comments from the board?

MR. GILLMAN: Yes.

MR. VANDERGRIFF: Oh, absolutely. But the comment now is really whether not to post it or not to approve it. I felt like that rather than the staff go off and look into this issue and propose something, we ought to know about it in advance, so I'm giving you an extra notice.

MR. GILLMAN: Well, I can offer some insight into some of the problems, if you want me to do that now or later.

MR. VANDERGRIFF: No. Please.

MR. GILLMAN: What I think may be part of the dilemma that we have is if you've got a Daewoo or whatever, they leave the United States or they quit manufacturing the vehicle and the dealers all shut down, definitely those consumers need some way to get their car repaired under warranty. But by the same token, you don't want to open up Pandora's Box there where there's no Acura dealer in -- and I'm making this up -- in Midland, Texas, so I just go out there and open me up a service center in Midland, Texas and it's going to basically hinder the placement of an Acura dealer in that area.

MR. VANDERGRIFF: Make it clear, this is a

little different. This is the line is being terminated and so there's no more, and you have to have been a franchised dealer.

MR. GILLMAN: If it is worded where if there's no longer the sale of brand Rocket, then if you want to have a service facility somewhere else, have at it.

MR. VANDERGRIFF: Not somewhere else, in the location where you're at.

MR. GILLMAN: Well, no, that's not what they're talking about. They're talking about doing it in a remote location.

MR. VANDERGRIFF: She was just explaining that the service-only facilities typically covered remote location service-facilities. This question or issue is different. This is literally the franchise is terminating, they'd be using existing facilities.

MR. GILLMAN: The example she used to begin with said if it was just an RV that they didn't have representation in east Texas and the dealer in west Texas sold it, can he go over there and open up a service facility, with the line still being sold, still being a franchise. I think if the manufacturer wants sales and service or service in an area, they ought to have a sales and service facility, as the law calls for now, I believe.

Now, if all the dealers are terminated and they

want to have service facilities, that's what the public deserves. But just letting them put service facilities wherever they want and still be in business is not a good idea.

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MR. RUSH: Let me speak to that a little bit. I brought this up to some other people.

But we're the largest Medium Duty GMC dealer in the United States, and so when GM exited the medium duty business, they gave us till this October to sell all our products. Well, I had 4- or 500 of them, I've sold all of them, that's not the problem.

But as of October 31, I think there were eight other states, including this one, that had this same issue -- now the other seven have been settled and I don't exactly know how; Texas is the only one that's got the problem today -- but as of October 31, all the ones we've recently sold and all the ones we've sold over five years -- and there's like 5,900 in Texas or close to 6,000 that were sold in the last five years, and that doesn't include the Ryder and the Penske and the U-Haul and all those that run through the state -- we, as a GMC dealer, cannot buy parts anymore or do warranty because we don't sell them.

So there's only a few dealers in the state that are light duty dealers that have the GMC franchise, most

of them don't. And it's not just not just GMC singling me 1 out, there's another 12 or 14 dealers, besides myself, 2 that have got locations, but they're in the same pot we 3 are. And I'm in a lot of medium duty business, I don't 4 have GMC, I've got a number of them, but if I don't take 5 care of the customer, he's going to blame me and never 6 come back and do business with me. 7 MR. GILLMAN: Well, like I stated, I think it's 8 9 wonderful if GMC, in all their wisdom, decided to get out 10 of that. 11 MR. RUSH: Which they have, last June a year 12 ago. MR. GILLMAN: Then if GMC wants to authorize 13 you to do that warranty service, I think that the State of 14 15 Texas ought to let you do that. MR. RUSH: But I don't know how you do that 16 17 quickly. MR. GILLMAN: But I'm saying if GMC is still in 18 19 business, they shouldn't let you put service centers in area that don't have sales facilities. 20 MR. RUSH: I agree with 100 percent of that. 21 MR. GILLMAN: Because that would create a major 22 23 problem. 24 MR. RUSH: Here's the problem with medium duty: 25 most car dealers can't work on them because the trucks

1 won't fit in the shop. I'm on your team, because they 2 MR. GILLMAN: quit. But I'm saying if they were still, if they had a 3 dealer across town. 4 5 MR. RUSH: Yes, I understand. But they don't 6 because there are no more medium duty trucks. 7 MR. GILLMAN: And I'm in total agreement with what you're saying. 8 9 MR. RUSH: But if we don't get it done by 10 October 31, it's going to be over. That's what I'm 11 concerned about. MR. GILLMAN: I don't know whether we can do 12 13 that by then. MR. RUSH: I don't either. 14 MR. GILLMAN: But I'm on your team, but I'm not 15 on the team of allowing a manufacturer that's still in 16 business having service facilities elsewhere. 17 MS. COST: And that is not at all what this is 18 19 discussion is about. It's not about ongoing lines. 20 MR. GILLMAN: In other words, if you can state specifically that they are no longer in business, they are 21 22 no longer selling those vehicles in the United States, or

I heard it the first time. Maybe I misunderstood.

MS. COST: Sorry. That was what I intended.

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Texas, then I can live with that. But that's not the way

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1 MR. GILLMAN: Well, good. MR. VANDERGRIFF: Well, if the board is of a 2 mind, Ms. Cost and the staff can at least try to 3 articulate this in writing and bring it back. 4 5 MR. GILLMAN: Do you need a motion for that? MR. VANDERGRIFF: I think as an action item 6 it's probably appropriate for a motion. You don't think 7 we need one? All right. Then we don't need one. 8 9 MR. GILLMAN: Then I move that we don't move 10 but we ask you to do it. 11 (General laughter.) 12 MS. COST: And I do just want to say that I plan on, even before I bring you a proposal back, talking 13 with industry because there are many manufacturers and 14 dealers that are affected by this, they're all affected a 15 little bit differently. I want to make sure I come back 16 with some language that's going to cover all of that, and 17 so I do plan on talking to industry before I even come 18 back to you with something. 19 20

MS. RYAN: Do you have an expectation on when you think you'll be back to us with something?

MS. COST: I'm going to try my best for November, because obviously this is a very hot issue.

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MR. GILLMAN: When you started this conversation, I think the example you used was an RV

1	manufacturer/dealer that was still in business and wanted
2	to put one for convenience sake in another part of Texas.
3	MS. COST: I apologize for the confusion. I
4	was trying to explain for those members of the board that
5	aren't as familiar what a service-only facility is. That
6	was that example.
7	MR. GILLMAN: Okay. Thank you.
8	MR. VANDERGRIFF: Thank you very much.
9	With that, unless any member of the board has
10	further items of business, I think we've concluded today's
11	business and I would look for a motion to adjourn.
12	MR. GILLMAN: You got it.
13	MR. VANDERGRIFF: So moved by Director Rush.
14	MR. BUTLER: You've got a second.
15	MR. VANDERGRIFF: Director Butler, thank you.
16	All those in favor, please raise your right
17	hand.
18	(A show of hands.)
19	MR. VANDERGRIFF: Thank you very much. We are
20	adjourned.
21	(Whereupon, at 1:08 p.m., the meeting was
22	concluded.)

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MEETING OF: Department of Motor Vehicles board

4 LOCATION: Austin, Texas

DATE: October 14, 2010

I do hereby certify that the foregoing pages, numbers 1 through 173, inclusive, are the true, accurate, and complete transcript prepared from the verbal recording made by electronic recording by Nancy H. King before the Texas Department of Motor Vehicles.

10/23/2010 (Transcriber) (Date)

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